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No. 91-535

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

ALAN B. BURDICK,

Petitioner,

vs.

MORRIS TAKUSHI, Director of Elections, State of
Hawaii; JOHN WAIHEE, Lieutenant Governor of
Hawaii; and BENJAMIN CAYETANO, in his capacity
as Lieutenant Governor of the State of Hawaii,

Respondents.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The
Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner's filing of a motion to extend the time for rehearing pursuant to Fed. R. App. P. 40 after the time for seeking such rehearing below had expired, which motion was granted, renders the otherwise untimely petition for rehearing below sufficient to toll the time in which certiorari must be sought?
2. Whether review of the issue presented by Petitioner is barred by 28 U.S.C. § 1738, in that Petitioner, in presenting his claims to the Supreme Court of Hawaii on questions certified thereto, exceeded the issues justifying certification, and whereafter the state court rejected on the merits Petitioner's arguments that Hawaii's constitutional provisions paralleling the federal Constitution void the law at issue here?
3. Whether Petitioner, who consistently refuses to identify any particular write-in candidate for whom he desires to vote, has prudential standing in this case?
4. Whether, in light of the opportunities voters in Hawaii enjoy to cast, and have counted and published, votes for their preferred candidates, Hawaii's election laws are federally void because write-in votes may not be cast at Hawaii's biennial elections?
5. Whether the Court of Appeals properly refused to order an election scheme mandating an accounting of write-in votes which had no legal effect and which would require Hawaii to subsidize protest speech?

PARTIES BEFORE THIS COURT

Respondent Morris Takushi is and at all relevant times has been the Director of Elections of the State of Hawaii, charged by law with the preparation of the ballots for Hawaii elections.

Respondent John Waihee was, in 1986, when D.C. Civil No. 86-0582 was filed in the District of Hawaii, Lieutenant Governor of Hawaii and the State of Hawaii's chief elections officer. Respondent Waihee was elected Governor in 1986, and was succeeded in office by Respondent Benjamin Cayetano. Respondent Cayetano, along with Respondent Takushi, was named as a defendant in D.C. Civil No. 88-0365, and was re-elected to office in November, 1990. All respondents were named in the courts below solely in their official capacities and so appear in this Court.

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MORRIS TAKUSHI, Director of Elections, State of
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Hawaii; and BENJAMIN CAYETANO, in his capacity as
Lieutenant Governor of the State of Hawaii,

Respondents.

—◆—
**Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The
Ninth Circuit**
—◆—

RESPONDENTS' BRIEF IN OPPOSITION
—◆—

Respondents Director of Elections, State of Hawaii,
and the Lieutenant Governor of Hawaii, pray that the
petition for review of the judgment of the United States
Court of Appeals for the Ninth Circuit, entered June
28,1991, be denied.

OPINIONS BELOW

In addition to those cited in the Petition, the deci-
sions of the Supreme Court of Hawaii in *Jenson v. Turner*,
40 Haw. 604 (1954), and in *Hustace v. Doi*, 60 Haw. 282,
588 P.2d 915 (1978), and of the court of appeals in *Erum v.*

Cayetano, 881 F.2d 689 (9th Cir. 1989), are relevant to this case. The April 15, 1991, order extending the time to seek rehearing below is also relevant and appears at our Appendix ("Resp. App.") "A".

JURISDICTION

The judgment of the court of appeals was entered March 1, 1991. A petition for rehearing was mailed on the fourteenth day after judgment, but was not received in the clerk's office until about March 18, 1991. Thereafter, Petitioner moved for, and received, an order from the court below extending the time to file the petition. Resp. App. "A." A response was called for and the petition was denied June 28, 1991. The original opinion was withdrawn, and a new opinion and judgment entered. The effect of these events under Rule 13.4 is briefed *infra*.

Jurisdiction in the district court was allegedly conferred by 28 U.S.C. §§ 1343, 2201, and 2202, and jurisdiction in the court of appeals lay under 28 U.S.C. §§ 1291 and 1292(a). As we dispute whether Petitioner has Article III or prudential standing, the issue of Petitioner's standing is briefed *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Hawaii Constitution and the Hawaii election code (Chapters 11, 12, 16, and 17, Hawaii Revised Statutes ("H.R.S.)) are reprinted in Resp. App. "B."

Article I, § 4, clause 1 of, and the Tenth Amendment to, the United States Constitution, and Article I, §§ 4 and 5 of the Hawaii Constitution are reprinted in Resp. App.

"C." Provisions of the related laws of other States are cited and summarized at pp. 5-7 *infra*.

STATEMENT OF THE CASE

If procedural obstacles do not block review, *see infra* pp. 28-30, the main issue in this case is whether the two-stage process by which Hawaii has elected its political leaders for decades, and which has been unanimously upheld during the past forty years on five separate occasions by the Ninth Circuit and the Supreme Court of Hawaii,¹ is facially void merely because Hawaii, like over twenty other States, does not provide an unlimited "right" to cast "write-in votes" at its elections.

A. How the Hawaii Election Code Works.

Since Hawaii became affiliated with the United States, the method for choosing our elected officials, as is

¹ See *Burdick v. Takushi*, 937 F.2d 415 (9th Cir. 1991); *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989); *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 824 (1989); *Hustace v. Doi*, 60 Haw. 282, 588 P.2d 915 (1978); *Jenson v. Turner*, 40 Haw. 604 (1954); cf. *Burdick v. Takushi*, 846 F.2d 547 (9th Cir. 1988) (refusing on abstention grounds to affirm judgment nullifying ban). Although Hawaii was a constitutional monarchy prior to the Republic which authorized our annexation by the United States, popular elections have existed in Hawaii since at least the 1840 Constitution, which authorized election of a House of Representatives "chosen by the people." Const. Kamehameha III, *Fundamental Law of Hawaii* 6 (1904 ed.). Hawaii's 1842 law made it a crime to vote for "another without his approbation," limiting choices to those willing to serve. Act of Nov. 2, 1842, reprinted in *id.* at 11. The write-in ban in pre-statehood days is chronicled, among other places, in *Holstein v. Young*, 10 Haw. 216 (1896), and *Jenson v. Turner*, 40 Haw. 604 (1954).

the case in most States, has embodied a two part process, a critical stage of which is the primary, in late September, in which voters " 'winnow out and finally reject all but the chosen candidates.' " *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986).

To prevent circumvention of this critical process by late-starting candidates and their surrogates,² protect political parties from "raiding" at the primary,³ give force to a primary mandate for candidates who have no opposition,⁴ ensure voters have time to study the candidates,⁵ vindicate eligibility rules that serve proper goals unrelated to First Amendment concerns,⁶ and otherwise enforce "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself,"⁷ Hawaii, like more than twenty other

² See *Munro*, 479 U.S. at 196; *Storer v. Brown*, 415 U.S. 724, 736 (1974); *Erum*, 879 F.2d at 693; *Stevenson v. State Board*, 794 F.2d 1176, 1177 (7th Cir. 1986) (Easterbrook, J., concurring).

³ See *Tashjian v. Republican Party*, 479 U.S. 208, 219 (1986); *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973).

⁴ See *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982); *Canaan v. Abdelnour*, 40 Cal. 3d 703, 726, 710 P.2d 268, 283, 221 Cal. Rptr. 468, 483 (1985).

⁵ See *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983); *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981); *Gebelein v. Nashold*, 406 A.2d 279, 281 (Del. Ch. 1979).

⁶ See *Clements v. Fashing*, 457 U.S. 957 (1982); *Fasi v. Cayetano*, 752 F. Supp. 942 (D. Haw. 1990) (*en banc*).

⁷ *Munro*, 479 U.S. at 196; *Anderson*, 460 at 788 n.9; *Mandel v. Bradley*, 432 U.S. 173 (1977); *American Party of Texas v. White*, 425 U.S. 767 (1974); *Storer*, 415 U.S. 424 (1974).

States,⁸ regulates its election process by barring the casting, counting, or consideration of votes – including write-in votes – for candidates who do not file their nomination papers on time, prove they are eligible, state a willingness to serve, emerge from the primary, or otherwise show compliance with law.

⁸ Laws of Indiana (Ind. P.L. No. 5-1986, § 61 (repealing Ind. Code § 3-1-23-23 (1977))), Nevada (Nev. Rev. Stat. § 293.270(2)), Oklahoma (Okla. Stat. Ann. tit. 26, § 71-127 (Supp. 1989)), and South Dakota (S.D. Codified Laws Ann. § 12-16-1 (1982 & Supp. 1990)) also ban write-ins. Texas bans write-ins at runoff elections, as does Louisiana. Texas Code Ann. (Vernons') § 146.002 (1986). Washington provides "[t]hat no write-in vote for a partisan office at a general election shall be valid for any person who has offered himself as a candidate for such position for the nomination at the preceding primary." Wash. Rev. Code Ann. § 29.51.1704 (Supp. 1986). New Mexico and Ohio do likewise. See N.M. Stat. Ann. § 1-12-19.1(E) (Supp. 1985); Ohio Rev. Code Ann. § 3513.04 (1989) (same); see also Ky. Rev. Stat. § 117.265(3) (no write-ins for Presidential electors); Neb. Rev. Stat. § 32-428 (1988) (other particular offices).

Nine other States ban primary write-ins. See Alaska Stat. § 15.25.070 (1988); Fla. Stat. § 101.011(6) (1989); Ga. Code Ann. § 34A-1124 (Harrison Supp. 1988); Kan. Stat. Ann. § 25-213 (1986); Md. Ann. Code, art. 33, § 5-3(f) (1986); Minn. Stat. § 204B.36(2) (1988); N.C. Gen. Stat. § 163-151(6)(e) (1987); Tex. Code Ann. § 172.112 (1986); Wis. Stat. § 8.17(3)(a) (1987-88).

At least seventeen States require substantial pre-election registration filings by write-in candidates, including the submission of particular information, as a condition of having any write-in votes counted for them. See Ariz. Rev. Stat. Ann. § 16-312 (1984 & Supp. 1989); Ark. Stat. Ann. § 7-5-205 (Supp. 1989); Cal. Elec. Code § 7300 (West 1977 & Supp. 1990); Colo. Rev. Stat. § 1-4-1001 (1980 & Supp. 1989); Conn. Gen. Stat. § 9-373(a) (1989); Ga. Code Ann. § 34A-915 (Harrison Supp. 1988); Idaho Code § 34-702A (Supp. 1989); Md. Elec. Code § 4D-1 (Supp. 1989); Mo. Rev. Stat. § 115.453(4)

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This modest limit exists in a scheme where candidates may, with no more than twenty-five petition signatures "wage a ballot-connected campaign." *Compare Munro*, 479 U.S. at 196. Indeed, Hawaii guarantees November ballot position to those who gather signatures equal to 1 per cent of the preceding vote, a "lenient" rule. *Williams v. Rhodes*, 393 U.S. 23, 33 n.9 (1968).

Hawaii thus provides three liberal routes to the November ballot. Our "open primary," see *Tashjian v. Republican Party*, 479 U.S. 208, 233 n.11 (1986), is critical to each.⁹

Under the "new party" route (HRS § 11-62), "any group of persons" garnering "signatures of currently registered voters" equal to one percent of the total registered voters in the last general election (*id.* § 11-62(a)) may form a party.¹⁰ Endorsers need not be members of the

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(1986); Mont. Code Ann. § 13-10-211 (1989); N.M. Stat. Ann. § 1-12-19.1 (1985); N.Y. Elec. Law § 6-164 (McKinney 1978 & Supp. 1990); Ohio Rev. Code Ann. § 3513.041 (Anderson 1988); Or. Rev. Stat. § 23-249.007 (1989); Utah Code Ann. § 20-7-20 (1984 & Supp. 1990); Wash. Rev. Code Ann. § 29.51.170 (1965 & Supp. 1990); Wis. Stat. § 8.16(2) (1987-88); see also *Stevenson v. State Board of Elections*, 638 F. Supp. 547, 552 (N.D. Ill. 1986).

⁹ Hawaii's route for Presidential candidates takes into account the unique factors in this national election, and allows the filing of petitions and candidate names up to sixty days prior to the general election. See HRS § 11-113. These provisions are not cited in the Petition, and were not cited much less challenged by Petitioner in any of the courts below.

¹⁰ Alabama (Ala. Code § 17-7-1(a)(3)); Alaska (Alaska Stat. § 15.25.160); Arizona (Ariz. Rev. Stat. Ann. § 16.341.E); California (Cal. Elec. Code § 6831); Connecticut (Conn. Gen. Stat.

(Continued on following page)

"group of persons desiring to qualify" (*id.*), and may sign multiple petitions and vote in the primary of their choice. While a petition must give "names and addresses of the officers of the central committee and of the respective county committees of the political party" and "the party rules," HRS § 11-62(a)(4) (emphasis added), the law does not disqualify a party if, in fact, it has no central committee, county committees, officers, or rules. See HRS § 11-62 (Supp. 1989); *id.* § 11-64. There is no requirement that a party name candidates in more than one race. See HRS § 11-61.

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Ann. § 9-453(d)); Delaware (Del. Code Ann. tit. 15, § 3002(b)); Georgia (Ga. Code Ann. §§ 21-2-170, 32-1010); Michigan (Mich. H.B. 4010 (1987 Sess.)); Missouri (Mo. Ann. Stat. § 9-115.321); South Dakota (S.D. Codified Laws Ann. § 12-7-1); and Texas (Tex. Elec. Code § 142.007(1)), have a 1% rule. Indiana (Ind. Code Ann. § 3-8-6-3); Massachusetts (Mass. Gen. L. Ann. ch. 53, § 8-6); North Carolina (N.C. Gen. Stat. § 163-22); and Pennsylvania (Pa. Stat. Ann. Tit. 25, § 2911), have a 2% rule. Florida (Fla. Stat. Ann. § 9-1-3.021(3)); Maryland (Md. Elec. Code Ann. art. 33, § 4B-1(h)), and Oregon (Or. Rev. Stat. § 23-249.740(a)), have a 3% rule. Louisiana (La. Elec. Code § 441); New Mexico (N.M. Stat. Ann. § 1-8-51); Nevada (Nev. Rev. Stat. § 24-293.200), and Wyoming (Wyo. Stat. § 22-5-304), have a 5% petition requirement. In Hawaii, the 1% rule, in 1986 when this litigation began, required 4,189 signatures. See C.R. 13 in No. 86-0582. In the court below, Petitioner admitted that at least six States, including Arkansas, Illinois, Kentucky, New York, North Dakota, Ohio, and South Carolina, as a result of non-percentage rules, require at least that many signatures for candidates in statewide contests. App. to Appellees' Ans. Br., Nos. 86-2689, 86-2703 (9th Cir. Apr. 1987) (C.R. 31 in No. 86-0582); see also *McClain v. Meier*, 851 F.2d 1045, 1047 (8th Cir. 1988) (7,000 signatures (1.6% rule)).

The filing deadline for parties occurs in mid- to late April. This deadline exists "to verify the validity of signatures on the petitions, to print the [primary] ballots, and if necessary, to litigate any challenges." *American Party of Texas v. White*, 415 U.S. at 787 n.15 (second Wednesday in June); see also *Rainbow Coalition v. State Election Board*, 844 F.2d 740, 744-46 (10th Cir. 1988) (May 31 deadline). The 150-day pre-primary deadline is critical as runaway winners at the primary in county and state legislative races are "elected" at the primary under HRS § 12-41(a) (1985), and Haw. Const. art. III, § 4. Prompt commencement of the primary season assures that voters are informed, and that candidates can be sure that the party under whose banner they wish to run has been fully confirmed.

While the "new party" route emphasizes a more early organization as a trade-off for minimization of the risk of elimination at the primary, numerous minor parties have participated under it at the November ballot stage. Indeed, in Hawaii's milieu, where candidates and parties do not face the "pressure of conducting a petition drive in adverse winter weather," see *Bradley v. Mandel*, 449 F. Supp. 983, 986 (D. Md. 1978), the Libertarian Party, People's Party, Citizen's Party, Independents for Godly Government, Aloha Democratic Party, and Independent Democratic Party have gained party status in Hawaii. See Clerk's Record 48 (No. 86-0582) (Respondents' official reports).

Once a new party is formed, a party candidate need only file a petition to enter that party's primary by late July, 60 days before the primary. The petition must contain twenty-five signatures for statewide and federal office (fifteen signatures for all others). HRS §§ 12-2.5, 12-6. A nominating voter need not pledge support for a

candidate, see *id.* § 12-3, cf. *Tashjian*, 479 U.S. at 225 n.13; nor need the nominator be a party member. HRS §§ 12-3(1), 12-4. Party candidates are selected at an open primary, where they may "campaign among the entire pool of registered voters." *Munro*, 479 U.S. at 197.

Hawaii's second avenue to the November ballot derives from the first and may be called the "established party" route. Parties which garner ten percent in any preceding state-wide or congressional race, or analogous showings in state legislative races, HRS §§ 11-61(b)(1)-(5), are exempted from petitioning. In addition, under 1986 legislation, "if a party qualifies through petition for three consecutive general elections, it will be deemed a political party for the following ten year period." Haw. H. Stand. Comm. Rep. No. 762-86 (Resp. App. 70).

The third route is placement on the nonpartisan primary ballot. Nonpartisans need not have party sponsorship, but run in a separate primary on primary day. HRS § 12-22. Nonpartisans thus need only meet the filing requirements for party candidates (HRS §§ 12-3 - 12-7), including the minimal petition requirements (25 signatures for statewide and federal races; 15 for others). Nonpartisans then may advance under HRS § 12-41, which has been authoritatively interpreted as follows:

The candidate of a qualified party may obtain nomination by securing any number of votes, no matter how few, if they constitute a plurality of votes cast for candidates of that party, while a nonpartisan candidate must receive a minimum number of votes [i.e., 10% of primary vote]. That minimum number, however, can never be more than the number of votes which has been sufficient to nominate a partisan candidate.

Hustace v. Doi, 60 Haw. at 289-90, 588 P.2d at 920. Eight of 26 nonpartisans running qualified for the November ballot from 1976-86, see *Erum, supra*, 881 F.2d at 690 n.2, and it is subject to judicial notice that, in November 1990, there were nonpartisan candidates for Governor/Lieutenant Governor and in mayoral races in the counties of Maui and of the Big Island of Hawaii.

Hawaii election law nonetheless bans "write-in" voting, and, indeed, has done so, with certain rare exceptions which no longer exist, for well over 90 years. See *Jenson v. Turner*, 40 Haw. 604, 613 (1954) ("[t]he privilege to 'write-in' a ballot would radically change both the primary and election laws"). While first viewed as "secur[ing] secrecy of the ballot," *Holstein v. Young*, 10 Haw. 216, 222 (1896), the ban furthers at least three added categories of compelling interests.

First, the ban on write-ins makes clear in two distinct ways that the primary is "'an integral part of the entire election process'" that "'functions to winnow out and finally reject all but the chosen candidates.'" *Munro*, 479 U.S. at 196. Thus, by making the primary count, the ban bars efforts by primary losers and their surrogates to carry intra-party feuds into the general election. *Id.* Like at least nine other states that ban write-ins for "sore-losers" and their supporters, Hawaii, by reserving the general election for "major struggles," *Storer*, 415 U.S. at 734, recognizes the importance of permitting a "winner in the general election [to enter office] with sufficient support to govern effectively." *Id.*; accord, *Buckley v. Valeo*, 424 U.S. 1, 96 (1976); *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). Along these lines, the ban ensures that the primary *can* count, by protecting the associational rights of the parties against

true "party raiding" by write-in votes, namely, a scenario where voters and candidates of one party seek to sabotage the results of another party's primary. See *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973). Like nine other States that ban primary write-ins, Hawaii operates on the view that such votes are "'inconsistent with the whole theory of primary elections.'" *State Administrative Board of Election Laws v. Calvert*, 272 Md. 659, 327 A.2d 290, 299 (1974), cert. denied, 419 U.S. 1110 (1975). As parties have the right to solicit independent voters, see *Tashjian*, 479 U.S. at 219, and Hawaii's Constitution mandates an open primary, the ban on write-ins in conjunction with candidate filing requirements, see, e.g., HRS § 12-3(7) (requiring certification that "the candidate is a member of the party"), is not only legitimate, but serves the compelling associational interests of the political parties by preventing last-minute "hostile takeovers" of rival parties.

Second, by barring late-blooming candidacies, the ban assures that candidates in all races have met valid requirements for holding office, have a modicum of support, and are able and willing to serve. Thus, for example, the ban on write-in votes enforces Hawaii's candidate age and residency requirements and other limits such as the state "resign-to-run" law. See *Fasi v. Cayetano*, 752 F. Supp. 942 (D. Haw. 1990) (en banc). At the same time, the Hawaii ban effects important procedural goals by guaranteeing a minimum period for scrutinizing the candidates, and allowing the State, before the election, to prevent "a situation where, after a candidate is elected, he is found not to possess the qualifications [for office]." *Hayes v. Gill*, 52 Haw. 251, 254, 472 P.2d 872, 875 (1970). And, since Hawaii law guarantees primary ballot placement to candidates who can produce only twenty-five signatures, the

only difference between Hawaii and the seventeen States which similarly ban write-in votes under specific circumstances is that, in Hawaii, any non-frivolous write-in candidate receives not just a write-in option, but a full blown opportunity to wage a ballot campaign.

Third, the ban on write-ins gives finality to races where there is a runaway primary winner. In county and state legislative races, a primary winner who faces no further ballot opposition is seated. See HRS § 12-41 and Haw. Const. art. III, § 4 (1989 Supp.). In other races, the seat is not filled, but the winner or her party retain important powers under state law. See HRS §§ 11-117, 11-118, 17-3, 17-4, 17-5. The write-in ban assures that the primary mandate is carried out, see *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 4-5 & n.4 (1982), once those who might defeat the runaway winner have had their chance.

B. The Proceedings Below.

Petitioner filed the first of the two actions below on August 21, 1986, to force Hawaii "to permit the casting and counting of write-in votes[.]" Complaint at 4, 5, C.R. 1 (No. 86-0582). The ostensible reason for the suit was the filing by only one candidate at the primary for state representative in the 19th District. Burdick alleged he wanted to vote in that race, "in both the primary and general elections, for a person who has not filed nominating papers and whose name will not be printed on the ballot." *Id.* at 3. He also stated an interest "in vot[ing] for other persons in other elections" "whose names are not, or may not be on the election ballot." *Id.* The District Court, overruling all the interests asserted by Hawaii, entered summary judgment and injunctive relief (see Pet.

App. at 66-77), relying mainly on the 1985 California Supreme Court's unreviewable federal dicta in *Canaan v. Abdelnour*, 40 Cal. 3d 703, 710 P.2d 268, 221 Cal. Rptr. 468 (1985), reasoning that the write-in ban (like every law authorizing votes to be ignored) "may prevent a candidate preferred by a majority of voters from winning election" and bars individual voters "from casting ballots for their preferred candidates." See Pet. App. 71-72. The court of appeals entered a stay, and, in 1988, vacated and remanded with instructions to abstain under the *Pullman* doctrine. See *Burdick v. Takushi*, 846 F.2d 547 (9th Cir. 1988).

On remand, the District Court certified questions to the Hawaii Supreme Court, including whether "the Constitution of the State of Hawaii require[s] Hawaii's election officials to permit the casting of write-in votes." See Pet. App. 56-60. Although Respondents had not urged abstention in the court of appeals on the basis that the textually parallel provisions of the Hawaii Constitution were appropriate sources of relief under State law, and any such urging would have been legally inappropriate under such decisions as *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 n.4 (1984), Petitioner, without filing a reservation under (or even citing to) *England v. Medical Examiners*, 375 U.S. 411 (1964), presented the same arguments raised in the District Court in support of claims under Haw. Const. art. I, § 4, which Petitioner claimed "tracks almost exactly the language of the Fourteenth Amendment," Exh. "S" to C.R. 47 at 17, No. 86-0582, and Haw. Const. art. I, § 5, which Petitioner claimed "tracks almost exactly the language of the Fourteenth Amendment." *Id.* Petitioner claimed this Court has "adopt[ed] the principle that write-in voting is fundamental" and

"has spoken on the importance of casting and counting write-in votes"; and that the state court should "take note of the construction of those parts of the Federal Constitution . . . which are virtually identical to sections of the Hawaii Constitution" (*id.* at 18, 20-21).

The state court rejected these arguments on the merits, adopting the central language from this Court's ruling in *Munro v. Socialist Workers' Party*, 479 U.S. 189 (1986):

Hawaii's election laws provide for easy access to the ballot by new, or minority, parties, and by nonpartisan candidates. However, they do require that the nomination process be followed, and they do attempt to make the process of casting and counting ballots an orderly one, where the opportunities for fraud are minimized.

Burdick v. Takushi, 70 Haw. 498, 499-500, 776 P.2d 824, 826 (1989), Pet. App. 54-55.

On May 10, 1990, the District Court nonetheless held that the Hawaii election code was unconstitutional on its face as the ban on write-in voting "impermissibly infringes on plaintiff's federal constitutional rights" and "no compelling state interests exist to justify this intrusion." *Burdick v. Takushi*, 737 F. Supp. 582, 592 (D. Haw. 1990), Pet. App. 50. Despite the avenues Hawaii law provided, the District Court found that Hawaii law imposed burdens that were "great," and "enormous." *Id.* at 588, 593, Pet. App. 41, 51. The District Court broadly condemned Hawaii's primary rules as "striking at the heart of our democratic processes," permitting the State to "substitute its judgment as to what the voters want for the voters' own judgment." *Id.* at 589, Pet. App. 44. The District Court found that, in its opinion, the ban "stifles

what may be serious, legitimate candidacy," and, invoking a freewheeling reference to " 'the principle that debate on public issues should be uninhibited, robust, and wide open,' " nullified the ban even as to races where candidates would be seated after the primary, reasoning that "it is worth the extra time and money for the electorate to be exposed to increased debate and public discussion." *Id.* at 591, Pet. App. 47-48.

On March 1, 1991, the Ninth Circuit, on Respondents' timely appeals, unanimously reversed. Reaching the merits of Petitioner's claims over Respondents' objections that those claims had been forfeited by their full presentation to the Hawaii Supreme Court, the panel reasoned that while the right to vote was "fundamental," the "asserted right to vote for *any* candidate [one] chooses does not implicate fundamental constitutional protections." *Burdick v. Takushi*, 927 F.2d 469, 474 (9th Cir. 1991), Pet. App. 26 (original emphasis). The panel observed that Hawaii "provide[s] candidates with considerable ease of access to the ballot," and the ban "is not based on the content or subject matter of a write-in vote." *Id.* The court found the interests in fighting party raiding and sore loser candidacies, in promoting informed voting, and in effecting the primary mandate, justified the ban's burdens on "rights of expression and association." *Id.* at 475, Pet. App. 28.¹¹

¹¹ While we urged there was no need, given distinct burdens placed on Maryland voters by that state's ballot access laws, to disagree with *Dixon v. Maryland State Administrative Board*, 878 F.2d 776 (4th Cir. 1989), the panel disagreed with, instead of distinguishing, *Dixon*. 927 F.2d at 475, Pet. App. 28-30.

On March 15, 1991, Petitioner mailed a petition for panel rehearing, believing, erroneously, that mailing sufficed under FRAP 25(a). After the deadline, Petitioner sought and obtained an order extending the time to file the petition. On June 28, 1991, the panel denied rehearing, withdrew its earlier opinion, and directed that a new opinion be filed which did not alter the result in any respect, but which made clear that the panel had construed this Court's decisions broadly, and Petitioner's claims still failed.¹² Petitioner did not seek an extension of time to file the Petition for certiorari in this Court.

REASONS FOR DENYING THE WRIT

Contrary to the rather broad rhetoric adopted by the Petition, the Ninth Circuit's judgment in this case does not come close to authorizing the States to adopt "the electoral scheme that once prevailed in the Soviet Union" (Pet. 10 n.5), and, in fact, plainly complies with the important, but properly limited, principles this Court has adopted in its regulation of State election schemes under the federal Constitution. While the Petition undoubtedly presents interesting "conceptual questions" (Pet. at 20) of more than academic interest, and affirmance below would plainly have warranted a writ, there is no basis for review here, and the Petition should be denied.

¹² See *Burdick v. Takushi*, 937 F.2d 415, 419 (9th Cir. 1991), Pet. App. 10 (deleting language to effect that Constitution "simply guarantee[s] an equal voice in the election of those who govern" (see 927 F.2d at 473) and resting decision on Burdick's claimed "unlimited right to vote for any particular candidate" in context of Hawaii's election scheme).

The short answer to the Petition is that the Ninth Circuit's reversal properly restored the balance expressed in this Court's decisions authorizing federal judicial restructuring of state election codes only where state laws, "in the context of [the state's] system [,]" *Anderson v. Celebrezze*, 460 U.S. 780, 803 (1983), make it "virtually impossible" for dissident votes to be counted, *Williams v. Rhodes*, 393 U.S. 23, 34 (1968), and thus "freeze the status quo," *Jenness v. Fortson*, 403 U.S. 431, 438 (1971). Having never established – or, indeed, even tried to establish – below that these predicates for federal interference are presented by Hawaii's electoral system, which plainly affords "easy access to the primary election ballot and the opportunity for the candidate to wage a ballot-connected campaign," *Munro v. Socialist Workers' Party*, 479 U.S. 189, 199 (1986), Petitioner now seeks the reinstatement of the district court's unprecedented injunction mandating write-in votes at all Hawaii elections without limit. Neither logic, precedent, nor history support review in order to examine this prayer.

Nor is there any true conflict, much less one meriting review, between the judgment below and those of sister courts of appeals or the highest courts of sister States. While the Petition invokes the Ninth Circuit's rejection of the rhetoric in *Dixon v. Maryland State Administrative Board*, 878 F.2d 776 (4th Cir. 1989), *Dixon* is easily harmonized with the result below in light of the relative necessity for write-in voting under Maryland's electoral system, see *Jackson v. Norris*, 195 A. 576, 586 (Md. 1937), as well as *Dixon's* own limits on the supposed "right to write-in." Moreover, any perceived conflict with *Dixon* hardly demonstrates a sufficient division amongst the lower appellate courts, virtually all of whom, as to the

federal issues here, side with Respondents. See, e.g., *McClain v. Meier*, 851 F.2d 1045 (8th Cir. 1988); *Rainbow Coalition v. Election Bd.*, 844 F.2d 740 (10th Cir. 1988); *Hall v. Simcox*, 766 F.2d 1171 (7th Cir.), cert. denied, 474 U.S. 1006 (1985); *Harden v. Board of Elections*, 74 N.Y.2d 796, 544 N.E.2d 605, 545 N.Y.S. 2d 686 (1989); cf. *Legislature of California v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991) (citing case below). The courts with jurisdiction over Hawaii have on five separate occasions upheld the write-in ban, and a substantial federal question can be conjured out of the ruling below only by ignoring the highly circumscribed instances in which federally-mandated write-in voting was ordered as a remedy to otherwise illegal election schemes. E.g., *Socialist Labor Party v. Rhodes*, 290 F. Supp. 893 (S.D. Ohio), aff'd, 393 U.S. 23 (1968); *Sullivan v. Grasso*, 292 F. Supp. 411 (D. Conn. 1968).

Finally, although the Petition fails of its own terms, there are at least two procedural obstacles to review: (1) the jurisdictional cloud hanging over the timeliness of the petition; and (2) Petitioner's failure properly to reserve the federal issue presented below given his unfettered argument of the merits of his federal claim in an effort to obtain a favorable ruling from the state courts under Hawaii's own Bill of Rights.

A. The Ninth Circuit's Reversal of the District Court's Unprecedented Injunction Plainly Comports with This Court's Rulings Circumscribing Review of State Electoral Frameworks.

The heart of the Petitioner's request for *certiorari* is the argument that "the Ninth Circuit entirely misconceived and misapplied" (Pet. 17) *Anderson v. Celebrezze*,

460 U.S. 780 (1983), in sustaining Hawaii's write-in ban, first by "adopting a narrow view of the constitutional interests implicated in the exercise of the franchise" (Pet. 10), and, second, "by casually accepting the state's proffered justification[s]" for the write-in ban (Pet. 17). These arguments are wrong.

First, as an initial matter, Petitioner does not even show how he has standing to invoke *Anderson*. While the Ninth Circuit held that the purely jurisdictional "injury-in-fact" component of standing was present, neither lower court, nor Petitioner, have ever shown how Mr. Burdick met the prudential component of standing, which requires "that a plaintiff's complaint fall within the zone of interests protected by the law invoked." See *Allen v. Wright*, 468 U.S. 737, 751 (1984). As the Petition virtually confesses, Petitioner has never identified any particular write-in candidate (even a fictitious one) he wishes to support, and has failed to bring his claims within the protected "zone" defined by this Court's election cases, namely, claims by supporters of specific "minor party or independent candidate[s]" who claim they are "frozen" out of the process. As the Eighth Circuit ruled recently, Mr. Burdick has never explained "why he is the only effective advocate of the voters' rights." *Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir. 1990). Here where a voter brings suit without specifying any candidate at all that that voter would support, standing is plainly lacking. As in *Lujan v. National Wildlife Foundation*, 110 S. Ct. 3177 (1990), Mr. Burdick may not sustain his standing with "conclusory allegations of an affidavit." *Id.* at 3188. His allegations that he "most likely" will want to vote for "someone" in future Hawaii elections on a write-in basis ought not to have been credited.

Even if Petitioner has standing, however, his failure to identify any candidate (or candidate group) he supports renders this case a facial challenge in its purest form, requiring the Petition to show there are "no circumstances in which the [ban] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); accord *Stevenson v. State Board*, 794 F.2d 1176, 1181 (7th Cir. 1986) (Easterbrook, J., concurring); see also *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). This the Petition cannot, and, indeed, does not even seek to, do. The essence of the Petition's suggestion of error below, in an apparent flight from the main theory on which Petitioner litigated his case for five years,¹³ is not that the write-in ban is unconstitutional in all circumstances, but that, in combination with particular facets of the election code under particular fact situations, the burdens imposed by Hawaii law are impermissible. Pet. at 17-23 (ban "sweeps too broadly").

While this claim is itself wrong, the initial point here is that Plaintiff, by virtually conceding that Hawaii can ban sore-loser write-in candidacies (as Plaintiff defines them), or ban write-ins at the primary, has left this Court with nothing to decide. For, by failing to specify precisely when and how and for what class of candidates he seeks to cast write-in votes, Mr. Burdick has only a purely

¹³ Indeed, despite Petitioner's heavy emphasis on Hawaii's April filing deadline for new-party petitions (see Pet. at 22), Petitioner made no argument over the filing deadline whatever in the District Court, which plainly prohibits his raising the issue now. Cf. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 278-79 (1977) (on failure to raise issues below).

facial, and plainly meritless, challenge to all limits on write-in voting whatsoever.

Even if this were not so, it cannot be said that "the Ninth Circuit seriously misapplied the *Anderson* model" (Pet. 19). At the outset, it is dubious that *Anderson's* balancing approach is even applicable to a ballot-access case such as this one. Here, as Hawaii grants minor party and independent candidates "easy access to the primary election ballot and the opportunity" "to wage a ballot-connected campaign," *Munro*, 479 U.S. at 199, that fact makes Hawaii law, per se, "more accommodating of First Amendment rights and values," in that "access to a state-wide ballot" is "guarantee[d]." *Id.* at 198-99. Thus, this case is controlled by *Munro*. Review should be denied for this reason.

Even on the most exacting level of scrutiny, however, Hawaii's laws pass muster. First, the Petition's argument that "the right to vote and to participate meaningfully in the electoral process extends well beyond the act of choosing among the candidates whose names appear on the ballot" (Pet. 12) simply begs the question as far as the burden of the write-in ban is concerned. This Court has never viewed exercise of the right to vote as a spectator sport in which participants can complain whenever their preferences do not appear on the ballot. Indeed, this Court has held that in Texas, where write-in ballots are severely constrained, a First Amendment challenge to a 500 signature requirement, *twenty times* Hawaii's most burdensome signature requirement, "approache[d] the frivolous." *American Party of Texas v. White*, 415 U.S. 767, 789 (1974). In fact, this Court has made clear that, given " 'the realities of the electoral process.' " a ban on write-in voting is of little moment, as the viability of write-in

candidacies is "dubious at best." *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974); see also *Anderson*, 460 U.S. at 799 n.26. Indeed in *Munro*, this Court, in upholding Washington's blanket primary scheme, took no issue with the Ninth Circuit's view of Washington law as banning write-in votes for candidates eliminated at the primary. Compare *Socialist Workers Party v. Munro*, 765 F.2d 1417, 1419 (9th Cir. 1985). Other election schemes have passed muster here despite full or partial bans on write-in voting. Compare *Clements v. Fashing*, 457 U.S. 957 (1982), with *Fasi v. Cayetano*, 752 F. Supp. at 950 n.4 (noting how, under Texas law, write-in votes for the candidates in *Clements* are impossible).

Indeed, the manner in which the Petition exaggerates the burden imposed by the write-in ban can be best seen by this Court's decisions which approve judicially-ordered write-in voting solely as a remedy for laws that otherwise "freeze the political status quo." *Jenness, supra*, 403 U.S. at 438.

Thus, in *Socialist Labor Party v. Rhodes*, 290 F. Supp. 893 (S.D. Ohio), *aff'd*, 393 U.S. 23 (1968), the three judge court's remedy of write-in voting was entered to correct an egregiously burdensome election scheme, which required, for new parties, the filing of signatures *fifteen times* as many as, and three *months* earlier than, Hawaii demands, and, which together with "substantial additional burdens" made it "virtually impossible for any party to qualify on the ballot except the Republican and Democratic parties." *Id.* at 25. Based on these facts, this Court affirmed "relief to the extent of having the right, despite Ohio laws, to get the advantage of write-in ballots." *Id.* at 34. As one judge in *Rhodes* reasoned:

[T]he limited participation of minority parties in the past, and the lack of any showing of an administrative burden or necessity is a clear indication that the denial of the right to write in the name of the candidate of one's choice, *when coupled with the effective denial of ballot position*, amounts to an intentional denial of the plaintiffs' constitutionally protected right to vote.

290 F. Supp. at 997 (concurring op.) (emph. added); see *Sullivan v. Grasso*, 292 F. Supp. 411, 412 (D. Conn. 1968) (same).

Hawaii law, by contrast, provides "easy access" to groups seeking to form new political parties. "Easy access" is also given independents at the primary, the main point for constitutional purposes. Hawaii has no early candidate filing deadline. Non-presidential candidates need file no earlier than the third week in July, while presidential candidates have until September. The non-partisan route is hardly "insurmountable" (Pet. at 21), for under the least favored party rule (*see supra* pp. 9-10), more than a third of non-partisans advance to the November ballot. Petitioner's factual argument to the contrary (Pet. at 21), is simply wrong. And, given the plethora of parties which have filed under the new party provisions, and the likelihood that more parties will attain established party status under the 1986 amendments, arguments over the viability of that independent avenue are similarly without foundation.

Petitioner's denigration of Hawaii's interests in the write-in ban is similarly misplaced. Petitioner complains that "there is no evidence in the record of any serious effort by 'sore losers' to mount a write-in campaign" (Pet. 18), but this Court has held that States do not need to sustain any particular degree of injury "as a predicate to

the imposition of reasonable ballot access restrictions," *Munro*, 479 U.S. at 195, and may employ "effectual means" to combat sore loser candidacies. See *Storer*, 415 U.S. at 736. Here, that is all Hawaii has done. As Judge Easterbrook noted in *Stevenson v. State Board*, 794 F.2d 1176 (7th Cir. 1986), those "whose juices are riled by the results of the primary" are not "entitled to enough time after the primary election to get on the ballot as an independent." *Id.* at 1177. The ban on write-ins properly precludes not only those who ran and lost, but those who "did not run in a primary election but [were] dismayed by the result." *Id.* at 1178. Even under "narrow tailoring," see *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), this is all the law requires. The Petition has no answer on this front, nor can Petitioner advance any serious argument that a complete default at the primary stage by all those who would seek to unseat a candidate can be the basis for a federal injunction.

Indeed, the Petition also presents no serious issue that banning write-ins at the primary stage is an appropriate means for protecting party interests in open primary States. Even the Fourth Circuit in *Dixon* had no quarrel with Maryland's total ban on primary write-ins. See *Calvert, supra*, 272 Md. 659, 327 A.2d 290 (1974), *cert. denied*, 419 U.S. 1110 (1975).

That the interests in defeating party raiding and sore loser candidacies (or in promoting the primary mandate)¹⁴ may be each insufficient to support the entire ban

¹⁴ The Petition wrongly claims the primary protection argument does not apply in "the vast majority of electoral contests." Pet. at 19. In fact, the only races in which a runaway primary winner is not seated are the governorship, Members of Congress, and the board of education. See HRS § 12-41.

(Pet. 17-18), makes no difference if, together, they do. Moreover, the Petition has no good answer to Hawaii's interest in education and striking ineligible candidates. See *Georges v. Carney*, 691 F.2d 297, 301 (7th Cir. 1982) (ballot is "not a vehicle for communicating messages; it is a vehicle only for putting candidates and laws to the electorate"). The late July candidate deadline has no serious constitutional flaw, a point that is underscored by the fact that electoral competition may just as likely be hindered by late deadlines which magnify the risk to early-starting candidates as by deadlines that are too prompt. As the court below observed, this case has nothing to do with content-based regulation of political speech, as opposed to voting, and therefore, the strict scrutiny which is admittedly necessary to the Petition's success (*cf. Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), cited at Pet. 19), is wholly inapt to the actions here. There is no conflict between the judgment below and the rulings and principles underlying this Court's First Amendment jurisprudence. The asserted right to vote for Mickey Mouse (or any other write-in candidate) presents no issue of importance, and review should thus be denied.

B. There is No True Conflict Among the Lower Appellate Courts, and any Perceived Conflict is Not Sufficient to Warrant the Expenditure of the Court's Scarce Resources.

Despite the foregoing, Petitioner nonetheless urges the Court to grant review based on the perceived conflict between the decision below and *Dixon v. Maryland State Administrative Board*, 878 F.2d 776 (4th Cir. 1989). For numerous reasons, however, this perceived conflict does not merit review.

First, although there is undoubtedly much in the Fourth Circuit's opinion with which we and the Ninth Circuit disagree, *Dixon's* seemingly stringent treatment of Maryland's limits on write-in voting appears to be the result of unique burdens imposed by Maryland's general routes to the ballot, which require pledges of hundreds of voters, even for the most minor races, "that they intend to vote for the person so nominated," and which require "costly, precarious, and laborious efforts." *Jackson v. Norris*, 195 A. 576, 586 (Md. 1937), cited, *Dixon*, 878 F.2d at 783 n.11 & 785 n.13. *Dixon's* result is therefore perhaps best explainable by the relative need for write-ins in Maryland, and hence, there is no true conflict at all here.

Moreover, *Dixon's* focus was on Maryland's exaction of a filing fee for write-in candidacies, an issue that is collateral to the justifications for our regulation here. Indeed, as to those facets of Hawaii law of which petitioner truly complains, i.e., filing deadlines in general, *Dixon* squarely supports Respondents and the judgment below. As the Fourth Circuit agrees, voters must "have time to study the candidates to gauge their seriousness prior to the actual balloting," 878 F.2d at 784, and hence *Dixon* does not affect Maryland's requirement that write-in candidates file declarations within a week of a candidate's expenditure of \$51. Md. Elec. Code Ann. § 4D-1 (Supp. 1989). *Dixon's* condemnation of a filing fee on top of this potentially early filing deadline, even if correct, has no import for Hawaii law, particularly since Hawaii has a fixed, relatively late candidate deadline (July 24 in 1990), and, upon a trivial showing of support, will grant timely candidates the more powerful device of a "ballot

connected campaign." *Munro*, 479 U.S. at 199. For these reasons as well there is no conflict.¹⁵

Even if this Court were to perceive a conflict between the judgment below and *Dixon*, however, the single panel decision in *Dixon* does not justify review for added important reasons.

First, the result in *Dixon*, although not in conflict with the decision below, would appear to be so obviously wrong, particularly in light of fee-waiver provisions of Maryland law, cf. *Lubin v. Panish*, 415 U.S. 709 (1974), that the more prudent result would be to allow the Fourth Circuit to correct it by an en banc review rather than deploy *certiorari* in a case from another Circuit (i.e., this case) for that purpose.

Second, although a contrary judgment in the court of appeals in this case plainly would have raised important issues, Mr. Burdick's prayer for complete elimination of any regulation of write-in voting is not one that appears important to Hawaii voters as a whole. Although several losing litigants in other Hawaii voting cases have appeared on the Petition as amici, not one other voter joined or sought to join (or even sought to file as amicus curiae) in support of Mr. Burdick during the five previous years this litigation was pending in the courts below.

Third, however one interprets *Dixon's* rhetoric, this is not an issue on which the lower appellate courts are closely divided. Indeed, the great weight of opinion is

¹⁵ *Canaan v. Abdelnour*, 40 Cal. 3d 703, 710 P.2d 268, 221 Cal. Rept. 468 (1985), which was decided on state constitutional grounds, and therefore unreviewable by this Court, is also best understood as involving a five-month-before-election candidate-filing rule, a far cry from our late July candidate deadline.

with the Ninth Circuit as to the principles underlying the issue in this case. Thus, the Seventh Circuit upheld Indiana's ban on write-in votes despite the fact that Indiana's new party petition signature requirements are double those of Hawaii. *Hall v. Simconx*, 766 F.2d 1171, 1175 (7th Cir.), cert. denied, 474 U.S. 1006 (1985)¹⁶ Other circuits, which *Dixon* did not address, are in accord. See *Rainbow Coalition v. Oklahoma State Elections Board*, 844 F.2d 740, 745 n.8 (10th Cir. 1988) ("we do not think that the lack of write-in votes is, as a practical matter, a significant distinction"); *McClain v. Meier*, 851 F.2d 1045 (8th Cir. 1988) (holding jurisdictionally insubstantial Nebraska's refusal "to count write-in votes"); see also *Zielasko v. Ohio*, 873 F.2d 957, 961 (6th Cir. 1989); *Harden v. Board of Elections*, 74 N.Y.2d 796, 544 N.E.2d 605, 545 N.Y.S.2d 686 (1989). Even courts which have ruled as a matter of state constitutional law that write-in voting is required are rethinking the validity of those holdings. See *Legislature of California v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991) (citing case below and *Canaan*, supra).

For all these added reasons, review should be denied.

C. Procedural Obstacles Cloud the Petition and Independently Warrant Denial of the Writ.

At least two added issues warrant denial of review.

¹⁶ For reasons that are unknown, the Indiana Attorney General did not appeal from the decision in *Paul v. Indiana Election Bd.*, 743 F. Supp. 616 (S.D. Ind. 1990), which was in direct conflict with the Seventh Circuit's decision in *Hall*. We submit that defaults by the Attorneys General of Indiana and of Kansas, see *Grogan v. Graves*, No 90-2378-0 (D. Kan. Oct. 30, 1990), are no basis for the granting of a writ of certiorari.

First, there is some doubt that the Petition is timely. Under this Court's Rules, the time for seeking review is tolled when "a petition for rehearing is timely filed in the lower court." Rule 13.4. Whether a court of appeals may unilaterally extend the time for review here by entering an order, based on a motion to extend time filed after the FRAP 40 deadline has passed is an open issue, particularly when the filing error in this case is apparent from the Rules. Indeed, as the petition was not granted, no oral hearing was held on it, cf. *Bowman v. Loperena*, 311 U.S. 262, 266 (1941), and no "matters of substance" were changed in the underlying judgment, see *FTC v. Minneapolis-Honeywell Co.*, 344 U.S. 206, 211 (1952), this Court's prior precedents suggest the time to petition here was not tolled. Petitioner, it should be noted, could have avoided this issue by obtaining an extension of time in this Court.

Second, and perhaps more important, Petitioner's claims cannot be reached in light of the failure to comply below with *England v. Medical Examiners*, 375 U.S. 411 (1964). Petitioner plainly submitted arguments to the state court that went beyond those called for by the abstention doctrine, and which called upon the Hawaii Supreme Court to resolve the identical constitutional issues here under the Hawaii analogues to the First Amendment and Due Process Clauses. In contrast to the procedure prescribed by *England*, Petitioner did not just raise arguments addressed to the textually distinct provisions of Hawaii law "in light of" his federal claims, as required by *Government Employees v. Windsor*, 353 U.S. 364 (1955), but in fact urged that relief be granted on the basis of state laws that "track almost exactly" the federal Constitution. Having done "more than is required by *Windsor*," it was Plaintiff's burden to make an "explicit

reservation" in the state courts "that he is exposing his federal [arguments] there only for the purpose of complying with *Windsor*." 375 U.S. at 419, 421. Petitioner wrongly seeks to "split a cause of action between federal and state courts where abstention is inappropriate." *Wicker v. Board of Education*, 826 F.2d 442, 446 (6th Cir. 1987). Since the Hawaii court's constitutional ruling, based on its view that Hawaii grants "easy access to the ballot," would, absent *England* concerns, be preclusive under 28 U.S.C. § 1738, see *Santos v. State*, 64 Haw. 648, 652, 646 P.2d 962, 965-66 (1982), the question presented ought not be reviewed for reasons wholly independent of the merits of the decision below.

CONCLUSION

For the reasons above, the writ should be denied or dismissed, or the judgment of the Ninth Circuit should be affirmed.

Dated: Honolulu, Hawaii, November 15, 1991.

Respectfully submitted,

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APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALAN B. BURDICK,	)	Nos. 90-15873,
Plaintiff-Appellee,	)	90-15876
)	
v.)	
MORRIS TAKUSHI, Director of)	
Elections, State of Hawaii; JOHN	)	D.C. No.
WAIHEE, Lieutenant Governor of	)	CV-86-0582-HMF
Hawaii; BENJAMIN CAYETANO,)	
in his capacity as Lieutenant)	
Governor of the State of Hawaii;)	
Defendants-Appellants.)	
<hr/>		
ALAN B. BURDICK,	)	No. 90-15877
Plaintiff-Appellee,)	
	)	D.C. No.
- v.	)	CV-88-0365-HMF
BENJAMIN CAYETANO, in his)	
capacity as Lieutenant Governor	)	ORDER
of the State of Hawaii; MORRIS	)	(Filed Apr. 15,
TAKUSHI, Director of Elections	)	1991)
of the State of Hawaii,)	
Defendants-Appellants,)	
<hr/>		

Before: BEEZER, Circuit Judge

Appellee's motion for an extension of time to file a petition for rehearing en banc from 14 days to 21 days is GRANTED.

APPENDIX "B"

HAWAII REVISED STATUTES (1985) TOGETHER WITH
PERTINENT AMENDMENTS, HISTORY AND CONSTITUTIONAL PROVISIONS

PART I GENERAL PROVISIONS

§11-1 Definitions. Whenever used in this title, the words and phrases in this title shall, unless the same is inconsistent with the context, be construed as follows:

"Ballot," a ballot including an absentee ballot is a written or printed, or partly written and partly printed paper or papers containing the names of persons to be voted for, the office to be filled, and the questions or issues to be voted on. A ballot may consist of one or more cards or pieces of paper depending on the number of offices, candidates to be elected thereto, questions or issues to be voted on, and the voting system in use. It shall also include the face of the mechanical voting machine when arranged with cardboard or other material within the ballot frames, containing the names of the candidates and questions to be voted on.

"Chief election officer," the lieutenant governor as set forth in section 11-2.

"Clerk," the county clerks of the respective counties.

"County," the counties of Hawaii, Maui, Kauai, and the city and county of Honolulu, as the context may require. For the purposes of this title, the county of Kalawao shall be deemed to be included in the county of Maui.

"Election," all elections, primary, special primary, general, special general, special, or county, unless otherwise specifically stated.

"Election officials," precinct officials and other persons designated as officials by the chief election officer.

"Hawaiian," any descendant of the aboriginal peoples inhabiting the Hawaiian Island which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

"Office," an elective public office.

"Political party" or "party," a political party qualified under part V of this chapter.

"Precinct," the smallest political subdivision established by law.

"Primary," a preliminary election in which the voters nominate candidates for office as provided for in chapter 12.

"Special election," any single election required by law when not preceded by an election to nominate those candidates whose names appear on the special election ballot.

"Special primary election" and "special general election," elections held only (a) whenever any vacancy occurs in the offices of United States senator, United States representative, state senator, or state representative because of failure to elect a person at an uncontested general election or (b) as specified in county charters.

"Voter," any person duly registered to vote.

"Voting system," the use of paper ballots, electronic ballot cards, voting machines, or any system by which votes are cast and counted. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(a); am L 1979, c 196, §3; am L 1980, c 264, §1(a)]

§11-2 Chief election officer. (a) The lieutenant governor shall be the chief election officer for the administration of this title. The lieutenant governor shall supervise all state elections. The chief election officer may delegate responsibilities in state elections within a county to the clerk of that county or to other specified persons.

(b) The chief election officer shall be responsible for the maximization of registration of eligible electors throughout the State. In maximizing registration the chief election officer shall make an effort to equalize registration between districts, with particular effort in those districts in which the chief election officer determines registration is lower than desirable. The chief election officer in carrying out this function may make surveys, carry on house to house canvassing, and assist or direct the clerk in any other area of registration.

(c) The chief election officer shall maintain data concerning registered voters, elections, apportionment, and districting. The chief election officer shall use this data to assist the reapportionment commission provided for under Article IV of the Constitution. [L 1970, c 26, pt of §2; am L 1979, c 51, §5; am imp L 1984, c 90, §1]

§11-3 Application of chapter. This chapter shall apply to all elections, primary, special primary, general,

special general, special, or county, held in the State, under all voting systems used within the State, so far as applicable and not inconsistent herewith. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(b)]

§11-4 Rules and regulations. The chief election officer may make, amend, and repeal such rules and regulations governing elections held under this title, election procedures, and the selection, establishment, use, and operation of all voting systems now in use or to be adopted in the State, and all other similar matters relating thereto as in the chief election officer's judgment shall be necessary to carry out this title.

In making, amending, and repealing rules and regulations for voters who cannot vote at the polls in person and all other voters, the chief election officer shall provide for voting by such persons in such manner as to insure secrecy of the ballot and to preclude tampering with the ballots of those voters and other election frauds. Such rules and regulations, when adopted in conformity with chapter 91 and upon approval by the governor, shall have the force and effect of law. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

§11-5 Employees. The chief election officer may employ a permanent staff, subject to the provisions of chapters 76 and 77, to supervise state elections; maximize registration of eligible voters throughout the State; maintain data concerning registered voters, elections, apportionment, and districting; and to perform other duties as prescribed by law. The chief election officer or county clerk may employ precinct officials and other election employees as the chief election officer or county clerk

may find necessary, none of whom shall be subject to the provisions of chapters 76 and 77. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(c); am L 1977, c 199, §2; am imp L 1984, c 90, §1]

* * *

PART V. PARTIES*

§11-61 "Political party" defined. (a) The term "political party" shall mean any party which was on the ballot at the last general election which has not been disqualified by this section and any political group which shall hereafter undertake to form a political party in the manner provided for in sections 11-62 to 11-64. A political party shall be an association of voters united for the purpose of promoting a common political end or carrying out a particular line of political policy and which maintains a general organization throughout the State, including a regularly constituted central committee and county committees in each county other than Kalawao.

(b) Any party which does not meet the following requirements shall be subject to disqualification:

- (1) A party must have had candidates running for election at the last general election for any of the offices listed in paragraphs (2) to (5) whose terms had expired. This does not include those offices which were vacant because the incumbent had died or resigned before the end of the incumbent's term;

* See 1986 amendments, *infra* pp. 63-66.

- (2) The party received at least ten per cent of all votes cast for any of the offices voted upon by all the voters in the State;
- (3) The party received at least ten per cent of all the votes cast in at least fifty per cent of the congressional districts;
- (4) The party received at least ten per cent of all the votes cast in at least the six senatorial districts with the lowest votes cast for the office of state senator; or
- (5) The party received at least ten per cent of all the votes cast in at least fifty per cent of the representative districts for the office of state representative. [L 1970, c 26, pt of §2; am L 1979, c 125, §3(1); am L 1983, c 34, §3]

§11-62 Formation of new parties; petition. (a) Any group of persons hereafter desiring to form a new political party in the State shall file with the chief election officer a petition as hereinafter provided. The petition for the formation of a new political party shall:

- (1) Be filed not later than 4:30 p.m. on the one hundred fiftieth day prior to the next primary;
- (2) Declare as concisely as may be the intention of signers thereof to form such new statewide political party in the State and state the name of the new party;
- (3) Contain the signatures of currently registered voters comprising not less than one per cent of the total registered voters of the State as of the last preceding general election;

- (4) Be accompanied by the names and addresses of the officers of the central committee and of the respective county committee, where they exist, of the new political party and by the party rules; and
- (5) Be upon the form prescribed and provided by the chief election officer.

(b) The petition shall be subject to hearing under chapter 91, if any objections are raised by the chief election officer or any political party. All objections shall be made not later than 4:30 p.m. on the tenth day after the petition has been filed. If no objections are raised by 4:30 p.m. on the tenth day, the petition shall be approved. If an objection is raised, a decision shall be rendered not later than 4:30 p.m. on the thirtieth day after filing of the petition or not later than 4:30 p.m. on the one hundredth day prior to the primary, whichever shall first occur.

(c) The chief election officer may check the names of any persons on the petition to see that they are registered voters and may check the validity of their signatures. The petition shall be public information upon filing. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(p); am L 1983, c 34, §4]

§11-63 Party rules, amendments to be filed. All existing parties must file their rules with the chief election officer not later than 4:30 p.m. on the one hundred fiftieth day prior to the next primary. All amendments shall be filed with the chief election officer not later than 4:30 p.m. on the thirtieth day after their adoption. The rules and amendments shall be duly certified to by an authorized officer of the party and upon filing, the rules and amendments thereto shall be a public record. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(q); am L 1983, c 34, §5]

§11-64 Names of party officers to be filed. All parties shall submit to the chief election officer and the respective county clerks not later than 4:30 p.m. on the ninetieth day prior to the next primary, a list of names and addresses of officers of the central committee and of the respective county committees. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(r); am L 1983, c 34, §6]

§11-65 Determination of party disqualification; notice of disqualification. Not later than 4:30 p.m. on the one hundred twentieth day after a general election, the chief election officer shall determine which parties were qualified to participate in the last general election, but which have become disqualified to participate in the forthcoming elections. Notice of intention to disqualify shall be served by certified or registered mail on the chairman of the state central committee or in the absence of the chairman, any officer of the central committee of the party, as shown by the records of the chief election officer. In addition, notice of intention to disqualify shall also be given by publication in a newspaper of general circulation.

If an officer of the party whose name is on file with the chief election officer desires a hearing on the notice of intention to disqualify, the officer of the party shall, not later than 4:30 p.m. on the tenth day after service by mail or not later than 4:30 p.m. on the tenth day after the last day upon which the notice is published in any county, whichever is later, file an affidavit with the chief election officer setting forth facts showing the reasons why the party should not be disqualified. The chief election officer shall call a hearing not later than twenty days following receipt of the affidavit. The chief election officer shall

notify by certified or registered mail the officer of the party who filed the affidavit of the date, time and place of the hearing. In addition, notice of the hearing shall be published in a newspaper of general circulation not later than five days prior to the day of the hearing. The chief election officer shall render the chief election officer's decision not later than 4:30 p.m. on the seventh day following the hearing. If the party does not file the affidavit within the time specified, the notice of intention to disqualify shall constitute final disqualification. A party thus disqualified shall have the right to requalify as a new party by following the procedures of section 11-62. [L 1970, c 26, pt of §2; am L 1973, c 217, §(5); am L 1977, c 189, §(4); am imp L 1984, c 90, §1]

* * *

PART VII. CONDUCT OF ELECTIONS

* * *

§11-91 Proclamation. Not later than 4:30 p.m. on the tenth day prior to the close of filing in elections involving state offices the chief election officer shall issue an election proclamation. In elections involving only county offices the clerk shall issue the proclamation. In elections involving both state and county offices the proclamation may be issued jointly.

The proclamation shall contain a statement of the time and places where, and the purposes for which, the election is to be held, and a designation of the offices and the terms thereof for which candidates are to be nominated or elected. It may also contain any other relevant matter including an offer of rewards for the detection and conviction of offenders against the election laws. The chief election officer or clerk shall cause the election

proclamation to be published at least once in a newspaper of general circulation and not later than on the tenth day prior the close of filing. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(aa)]

§11-92 REPEALED. L 1983, c 34, §8.

§11-92.1 Election proclamation: establishment of a new precinct. (a) The chief election officer shall issue a proclamation whenever a new precinct is established in any representative district. The chief election officer shall provide a suitable polling place for each precinct. Schools, recreational halls, park facilities, and other publicly owned or controlled buildings shall, whenever possible and convenient, be used as polling places. The chief election officer shall make arrangements for the rental or erection of suitable shelter for this purpose whenever public buildings are not available and shall cause these polling places to be equipped with the necessary facilities for lighting, ventilation, and equipment needed for elections on any island. This proclamation may be issued jointly with the proclamation required in section 11-91.

(b) No change shall be made in the boundaries of any precinct later than 4:30 p.m. on the tenth day prior to the close of filing for an election. [L 1983, C 34, §9; am L 1984, c 39, §1]

§11-92.2 Multiple polling place sites. (a) The chief election officer may establish multiple polling place sites for contiguous precincts, notwithstanding district boundaries, when it is convenient and readily accessible for the voters of the precincts involved.

(b) No multiple polling place site shall be established later than 4:30 p.m. on the tenth day prior to the close of filing for an election. [L 1983, c 34, §10; am L 1984, c 39, §2]

§11-92.3 Consolidated precincts: natural disasters; special elections. (a) In the event of a flood, tsunami, earthquake, volcanic eruption, high wind, or other natural disaster occurring prior to an election which makes a precinct inaccessible, the chief election officer or county clerk in the case of county elections may consolidate precincts within a representative district. The chief election officer or county clerk in the case of county elections shall give notice of the consolidation in the affected county prior to the opening of the precinct polling places by whatever possible news or broadcast media. Precinct officials and workers affected by the consolidation shall not forfeit their pay.

(b) In the event the chief election officer or the county clerk in a county election determines that the number of candidates or issues on the ballot in a special, special primary, or special general election does not require the full number of established precincts, such precincts may be consolidated for the purposes of the special, special primary, or special general election into a small number of special, special primary, or special general election precincts. A special, special primary, or special general election precinct shall be considered the same as an established precinct for all purposes, including precinct official requirements provided in section 11-71. Not later than 4:30 p.m. on the tenth day prior to the special, special primary, or special general election the chief election officer or the county clerk shall give public

notice is a newspaper of general circulation in the area in which the special, special primary, or special general election is to be held of the special, special primary, or special general election precincts and their polling places. Notices of such consolidation shall also be posted on election day at the established precinct polling places giving the location of the special, special primary, or special general election precinct polling place. [L 1983, c 34, §11]

§11-93 Voting units. Immediately after the close of registration of voters preceding any election, the chief election officer shall establish one or more voting units in each precinct polling place. All voting units shall be in the same precinct polling place. In a precinct having more than one voting unit the chief election officer or the officer's authorized representative shall designate each unit by a uniform identification system. The clerk in preparing the list of registered voters shall divide the list, on an alphabetical basis, as equal as possible between or among the voting units. [L 1970, c 26, pt of §2; am L 1979, c 133, §3; am imp L 1984, c 90, §1]

§11-94 Exemptions of voters on election day. Every voter shall be privileged from arrest on election day while at the voter's polling place and in going to and returning therefrom, except in case of breach of the peace then committed, or in case of treason or felony. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

§11-95 Employees entitled to leave on election day for voting. Any voter shall on the day of the election be entitled to be absent from any service or employment in which such voter is then engaged or employed for a

period of not more than two hours (excluding any lunch or rest periods) between the time of opening and closing the polls to allow two consecutive hours in which to vote. Such voter shall not because of such absence be liable to any penalty, nor shall there be any rescheduling of normal hours or any deduction made, on account of the absence from any usual salary or wages; provided that the foregoing shall not be applicable to any employee whose hours of employment are such that the employee has a period of two consecutive hours (excluding any lunch or rest periods) between the time of opening and closing the polls when the employee is not working for the employer. If, however, any employee fails to vote after taking time off for that purpose the employer, upon verification of that fact, may make appropriate deductions from the salary or wages of the employee for the period during which the employee is hereunder entitled to be absent from employment. Presentation of a voter's receipt by an employee to the employer shall constitute proof of voting by the employee. Any person violating this section shall be guilty of an offense under section 19-8. [L 1970, c 26, pt of §2; am L 1976, c 106, §1(7); am L 1981, c 100, §1(1)]

§11-96 Records prima facie evidence. Every record made pursuant to law by a board of registration of voters, or the precinct officials, shall be a prima facie evidence of the facts there in set forth, and shall be received as such in any court or tribunal in which the same is offered in evidence. [L 1970, c 26, pt of §2; am L 1973, c 217, § 1(cc)]

§11-97 Records open to inspection. The register of voters and all records appertaining to the registry of voters, or to any election, in the possession of the board

of registration, the precinct officials, the chief election officer, or the clerk shall, at all reasonable times, be open to the inspection of any voter with the following exception: the voted ballots and other sealed election materials shall not be open to the inspection of any voter until after the end of the contest period unless opened upon order of the court. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(dd); am L 1983, c 34, §12]

§11-98 Forms and materials used in elections. Books blanks, records, certificates, and other forms and materials required by this title shall be of uniform character suitable for the voting system in use and shall be prescribed by the chief election officer after consultation with the clerks involved. [L 1970, c 26, pt of §2]

§11-99 Members of Congress, applicability of election laws. The nomination and election of a senator or representative to Congress shall be in conformity to the laws applicable to the election of members of the state legislature except as expressly otherwise provided or where in conflict with federal law. [L 1970, c 26, pt of §2]

* * *

PART VIII. BALLOTS

§11-111 Officials and facsimile ballots. Ballots issued by the chief election officer in state elections and by the clerk in county elections are official ballots. In elections using the paper ballot and electronic voting systems, the chief election officer or clerk in the case of county elections shall have printed informational posters containing facsimile ballots which depict the official ballots to be used in the election. The precinct officials shall post the informational posters containing the facsimiles

of the official ballots near the entrance to the polling place where they may be easily seen by the voters prior to voting. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(cc); am L 1975, c 36, §1(4); am L 1980, c 264, §1(f)]

§11-112 Contents of ballot. (a) The ballot shall contain the names of the candidates, their party affiliation or nonpartisanship in partisan election contests, the offices for which they are running, and the district in which the election is being held. In multimember races the ballot shall state that the voter shall not vote for more than the number of seats available or the number of candidates listed where such number is less than the seats available.

(b) The ballot may include questions concerning proposed state constitutional amendments, proposed county charter amendments, or proposed initiative or referendum issues. When the legislature passes a bill to submit a proposed constitutional amendment to the electorate, the bill shall contain the exact question that is to be printed on the ballot. The question shall be phrased to require a "yes" or "no" response by the voter.

(c) At the chief election officer's discretion, the ballot may have a background design imprinted onto it.

(d) When the electronic voting system is used, the ballot may have pre-punched codes and printed information which identify the voting districts, precincts, and ballot sets to facilitate the electronic data processing of these ballots.

(e) The name of the candidate may be printed with the Hawaiian or English equivalent or nickname, if the

candidate so requests in writing at the time the candidate's nomination papers are filed. Candidates' names, including the Hawaiian or English equivalent or nickname, shall be set on one line.

(f) The ballot shall bear no word, motto, device, sign, or symbol other than allowed in this title. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(5); am L 1977, c 189, §1(7); am L 1980, c 264, §1(g); am L 1983, c 34, §13; am L 1984, c 62, §1]

§11-113 Presidential ballots. (a) In presidential elections, the names of the candidates for president and vice president shall be used on the ballot in lieu of the names of the presidential electors, and the votes cast for president and vice president of each political party shall be counted for the presidential electors and alternates nominated by each political party.

(b) A "national party" as used in this section shall mean a party established and admitted to the ballot in at least one state other than Hawaii or one which is determined by the chief election officer to be making a bona fide effort to become a national party. If there is no national party or the national and state parties or factions in either the national or state party do not agree on the presidential and vice presidential candidates, the chief election officer may determine which candidates' names shall be placed on the ballot or may leave the candidates' names off the ballot completely.

(c) All candidates for president and vice president of the United States shall be qualified for inclusion on the general election ballot under either of the following procedures:

- (1) In the case of candidates of political parties which have been qualified to place candidates on the primary and general election ballots, the appropriate official of those parties shall file a sworn application with the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election, which shall include:
 - (A) The name and address of each of the two candidates;
 - (B) A statement that each candidate is legally qualified to serve under the provisions of the United States Constitution;
 - (C) A statement that the candidates are the duly chosen candidates of both the state and the national party, giving the time, place, and manner of the selection.
- (2) In the case of candidates of parties or groups not qualified to place candidates on the primary or general election ballots, the person desiring to place the names on the general election ballot shall file with the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election:
 - (A) A sworn application which shall include the information required under (1)(A) and (B) above, and (C) where applicable;
 - (B) A petition which shall be upon the form prescribed and provided by the chief election officer containing the signatures of currently registered

voters which constitute not less than one per cent of the votes cast in the State at the last presidential election. The petition shall contain the names of the candidates, a statement that the persons signing intend to support those candidates, the address of each signatory, the date of the signer's signature and other information as determined by the chief election officer.

Prior to being issued the petition form, the person desiring to place the names on the general election ballot shall submit a notarized statement from each candidate of that person's intent to be a candidate for president or vice president of the United States on the general election ballot in the State of Hawaii.

(d) Each applicant, and the candidates named, shall be notified in writing of the applicant's or candidate's eligibility or disqualification for placement on the ballot not later than 4:30 p.m. on the tenth day after filing or not later than 4:30 p.m. on the fiftieth day prior to the presidential election, whichever is less.

(e) If the applicant, or any other party, individual, or group with a candidate on the presidential ballot, objects to the finding of eligibility or disqualification the person may, not later than 4:30 p.m. on the fifth day after the finding, file a request in writing with the chief election officer for a hearing on the question. A hearing shall be called not later than 4:30 p.m. on the tenth day after the receipt of the request and shall be conducted in accord with chapter 91. A decision shall be issued not later than 4:30 p.m. on the fifth day after the conclusion

of the hearing. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ff); am L 1977, c 189, §1(8); am L 1983, c 34, §14]

§11-114 Order of offices on ballot. The order of offices on a ballot shall be arranged substantially as follows: first, president and vice president of the United States; next, United States senators; next, United States house of representatives; next, governor and lieutenant governor; next, state senators; next, state representatives; and next, county offices. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(gg); am L 1980, c 264, §1(h)]

§11-115 Arrangement of names on the ballot. The names of the candidates shall be placed upon the ballot for their respective offices in alphabetical order except as provided in section 11-118 and the limitations of the voting system in use, and except for the case of the candidates for vice president and lieutenant governor in the general election whose names shall be placed immediately below the name of the candidate for president or governor of the same political party.

In elections using the paper ballot or electronic voting systems where the names of the candidates are printed and the voter records the voter's vote on the face of the ballot, the following format shall be used: A horizontal line shall be ruled between each candidate's name and the next name, except between the names of presidential and vice presidential candidates and candidates for governor and lieutenant governor of the same political party in the general election. In such case the horizontal line will follow the name of the candidates for vice president and lieutenant governor of the same political party, thereby grouping the candidates for president and

vice president and governor and lieutenant governor of the same political party within the same pair of horizontal lines. Immediately after all the names, on the right side of the ballot, two vertical lines shall be ruled, so that in conjunction with the horizontal lines, a box shall be formed opposite each name and its equivalent, if any. In case of the candidates for president and vice president and governor and lieutenant governor of the same political party, only one box shall be formed opposite their set of names. The boxes shall be of sufficient size to give ample room in which to designate the choice of the voter in the manner prescribed for the voting system in use. All of the names upon a ballot shall be placed at a uniform distance from the left edge and close thereto, and shall be of uniform size and print subject to section 11-119. [L 1970, c 26, pt of §2; am L 1973, c 217, §1 (hh); am L 1976, c 106, §1(8); am L 1977, c 189, §1(9); am imp L 1984, c 90, §1]

§11-116 Checking ballot form by candidates and parties. Facsimiles of all ballot layouts prior to printing shall be available for viewing by the candidates and the parties at the office of the chief election officer and the county clerk as soon after the close of filing as they are available. Such layout facsimiles [sic] shall show the type faces used, the spelling and placement of names, and other information on the ballot. [L 1970, c 26, pt of §2]

§11-117 Withdrawal of candidates; disqualification; death; notice. (a) Any candidate may withdraw not later than 4:30 p.m. on the day immediately following the close of filing for any reason and may withdraw after the close of filing up to 4:30 p.m. on the twentieth day prior to an

election for reasons of ill health. When a candidate withdraws for ill health, the candidate shall give notice in writing to the chief election officer if the candidate was seeking a congressional or state office, or the candidate shall give notice in writing to the county clerk if the candidate was seeking a county office. The notice shall be accompanied by a statement from a licensed physician indicating that such ill health may endanger the candidate's life.

(b) On receipt of the notice of withdrawal the chief election officer or the clerk shall inform the chairperson of the political party of which the person withdrawing was a candidate. When a candidate dies, withdraws, or is disqualified after the close of filing and the ballots have been printed, the chief election officer or the clerk shall either order the candidate's name stricken from the ballot or order that a notice of the disqualification, withdrawal, or death be prominently posted at the appropriate polling places on election day.

(c) In no case shall the filing fee be refunded after filing. [L 1970, c 26, pt of §2; am L 1972, c 77, §3; am L 1973, c 217, §1(n); am L 1983, c 34, §15]

§11-118 Vacancies; new candidates; insertion of names on ballots. In case of death, withdrawal, or disqualification of any party candidate after filing the vacancy so caused may be filled by the appropriate committee of the party. The party shall be notified by the chief election officer or the clerk in the case of a county office immediately after the death, withdrawal, or disqualification. If the party fills the vacancy, and so notifies the chief election officer or clerk not later than 4:30 p.m.

on the third day after the vacancy occurs, but not later than 4:30 p.m. on the fiftieth day prior to a primary or special primary election or not later than 4:30 p.m. on the fortieth day prior to a special, general, or special general election, the name of the replacement shall be printed in an available and appropriate place on the ballot, not necessarily in alphabetical order. If no substitution is made, the candidacy involved shall be declared vacant. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(jj); am L 1980, c 247, §1; am L 1983, c 34, §16]

§11-119 Printing quantity. (a) The ballots shall be printed by order of the chief election officer or the clerk in the case of county elections. In any state or county election the chief election officer on agreement with the clerk may consolidate the printing contracts for similar types of ballots where such consolidation will result in lower costs.

(b) Whenever the chief election officer is responsible for the printing of ballots, the exact wording to appear thereon, including, but not limited to, questions and issues shall be submitted to the chief election officer not later than 4:30 p.m. on the sixtieth calendar day prior to the applicable election.

(c) Based upon clarity and available space, the chief election officer or the clerk in the case of county elections shall determine the style and size of type to be used in printing the ballots. The color, size, weight, shape, and thickness of the ballot shall be determined by the chief election officer.

(d) Each precinct shall receive a sufficient number of ballots based on the number of registered voters and

the expected spoilage in the election concerned. A sufficient number of absentee ballots shall be delivered to each clerk not later than 4:30 p.m. on the fifteenth day prior to the date of any election. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(kk); am L 1975, c 36, §1(6); am L 1976, c 106, §1(9); am L 1979, c 133, §4; am L 1980, c 264, §1(l); am L 1985, c 203, §4]

§11-120 Distribution of ballots; record. The chief election officer or the county clerk in county elections shall forward the official ballots, specimen ballots, and other materials to the precinct officials of the various precincts. They shall be delivered and kept in a secure fashion in accordance with rules and regulations promulgated by the chief election officer. In no case shall they arrive later than the opening of the polls on election day.

A record of the number of ballots sent to each precinct shall be kept by the chief election officer or the clerk. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ll)]

* * *

PART IX. VOTING PROCEDURES

§11-131 Hours of voting. The polls shall be opened by the precinct officials at 7:00 a.m. of the election day and shall be kept open continuously until 6:00 p.m. of that day. If, at the closing hour of voting, any voter desiring to vote is standing in line outside the entrance of the polls with the desire of entering and voting, but due to the polling place being overcrowded has been unable to do so, the voter shall be allowed to vote irrespective of the closing hour of voting. No voter shall be permitted to enter or join the line after the prescribed hour for closing

the polls. If all of the registered voters of the precinct have cast their votes prior to the closing time, the polls may be closed earlier but the votes shall not be counted until after closing time unless allowed by the chief election officer. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(mm); am imp L 1984, c 90, §1]

§11-132 One thousand foot radius; admission within polling place. (a) The precinct officials shall post in a conspicuous place, prior to the opening of the polls, a map designating an area of one thousand feet in radius around the polling place. Any person who remains or loiters within an area of one thousand feet in radius around the polling place for the purpose of campaigning shall be guilty of a misdemeanor.

(b) Admission within the polling place shall be limited to the following:

- (1) Election officials;
- (2) Watchers, if any, pursuant to section 11-77;
- (3) Candidates;
- (4) Any voters actually engaged in voting, going to vote or returning from voting;
- (5) Any person, designated by a voter who is physically disabled, while the person is assisting the voter; and
- (6) Any person or nonvoter group authorized by the chief election officer or the clerk in county elections to observe the election at designated precincts for educational purposes provided that they conduct themselves so that they do not interfere with the election process. [L 1970, c 26, pt of §2; am

L 1973, c 217, §1(nn); am L 1975, c 36, §1(7); am L 1980, c 264, §1(j); am imp L 1984, c 90, §1]

§11-133 Voting booths; placement of visual aids. The precinct officials shall provide sufficient voting booths within the polling place at or in which the voters may conveniently cast their ballots. The booths shall be so arranged that in casting the ballots the voters are screened from the observation of others.

Visual aids shall be posted at or in each voting booth and in conspicuous places outside the polling places before the opening of the polls. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(oo); am L 1975, c 36, §1(7A); am L 1981, c 100, §1(2)]

§11-134 Ballot transport containers, ballot boxes. (a) The seals of the ballot transport containers shall be broken and opened on election day only in the presence of at least two precinct officials not of the same political party.

(b) The chief election officer shall provide suitable ballot boxes for each polling place needed. They shall have a hinged lid fastened securely by a nonreusable seal. In the center of the lid there shall be an aperture of the appropriate size for the voting system used. The ballot boxes shall be placed at a point convenient for the deposit of ballots and where they can be observed by the precinct officials.

(c) At the opening of the polls for election, the chairperson of the precinct officials shall publicly open the ballot boxes and expose them to all persons present to show that they are empty. The ballot boxes shall be closed and sealed; they shall remain sealed until transported to

the counting center; provided that, in precincts where the electronic voting system is used, the ballot boxes shall not be opened at the polling places except as provided by rules adopted pursuant to chapter 91. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(8); am L 1980, c 264, §1(k); am L 1983, c 34, §17]

§11-135 Early collection of ballots. In an electronic ballot system election the chief election officer may authorize collection of voted ballots before the closing of the polls in order to facilitate the counting of ballots; provided that the voted ballots shall be returned to the counting center in sealed ballot boxes. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(pp); am L 1975, c 36, §1(9); am L 1980, c 264, §1(l); am L 1983, c 34, §18]

§11-136 Poll book, identification, voting. Every person upon applying to vote shall sign the person's name in the poll book prepared for that purpose. This requirement may be waived by the chairman of the precinct officials if for reasons of illiteracy or blindness or other physical disability the voter is unable to write. Every person shall provide identification if so requested by a precinct official.

After signing the poll book and receiving the voter's ballot, the voter shall proceed to the voting booth to vote according to the voting system in use in the voter's precinct. The precinct official may, and upon request shall, explain to the voter the mode of voting. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(qq); am imp L 1984, c 90, §1]

§11-137 Secrecy; removal or exhibition of ballot. No person shall look at or ask to see the contents of the ballot

or the choice of party or nonpartisan ballot of any voter, except as provided in section 11-139, nor shall any person within the polling place attempt to influence a voter in regard to whom the voter shall vote for. When a voter is in the voting booth for the purpose of voting, no other person shall, except as provided in section 11-139, be allowed to enter the booth or to be in a position from which the person can observe how the voter votes.

No person shall take a ballot out of the polling place except as provided in sections 11-135 and 11-139. After voting the voter shall leave the voting booth and deliver the voter's ballot to the precinct official in charge of the ballot boxes. The precinct official shall make certain that the precinct official has received the correct ballot and no other and then shall deposit the ballot into the ballot box. No person shall look at or ask to see the contents of the unvoted ballots. If any person having received a ballot leaves the polling place without first delivering the ballot to the precinct official as provided above, or wilfully exhibits the person's ballot or the person's unvoted ballots in a special primary or primary election, except as provided in section 11-139, after the ballot has been marked, such person shall forfeit the person's right to vote, and the chairman of the precinct officials shall cause a record to be made of the proceeding. [L 1970, c 26, pt of §2; am L 1972, c 158, §1; am L 1973, c 217, §1(rr); am L 1975, c 36, §1(10); am L 1980, c 264, §1(m); am imp L 1984, c 90, §1]

§11-138 Time allowed voters. A voter shall be allowed to remain in the voting booth for five minutes, and having voted the voter shall at once emerge and leave the voting booth. If the voter refuses to leave when

so requested by a majority of precinct officials after the lapse of five minutes, the voter shall be removed by the precinct officials. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ss), am L 1980, c 264, §1(n); am imp L 1984, c 90, §1]

§11-139 Voting assistance. (a) Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or agent of the voter's union, or the voter may receive the assistance of two precinct officials who are not of the same political party. Before rendering assistance or permitting assistance to be rendered, the precinct officials shall be satisfied that the physical disability exists. If a voter with a physical disability finds it unduly burdensome to enter the polling place, the voter may be handed a ballot outside the polling place but within one hundred feet thereof by the precinct officials and in their presence but in a secret manner, mark and return the same to the precinct officials.

(b) The precinct officials shall enter in writing in the record book the following:

- (1) The voter's name;
- (2) The fact that the voter cannot read the names on the ballot, if that is the reason for requiring assistance, and otherwise, the specific physical disability which requires the voter to receive assistance; and
- (3) The name or names of the person or persons furnishing the assistance. [L 1970, c 26, pt of §2; am L 1972, c 158, §2; am L 1973, c 217, §1(tt); am L 1985, c 203, §5]

§11-140 Spoiled ballots. In elections using the paper ballot and electronic voting systems, if a voter spoils a ballot, the voter may obtain another upon returning the spoiled one. Before returning the spoiled ballot, the voter shall conform to the procedure promulgated by the chief election officer to retain the secrecy of the vote. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(uu); am L 1975, c 36, §1(ll); am L 1980, c 264, §1(o); am L 1981, c 100, §1(e)]

* * *

PART X. VOTE DISPOSITION

§11-151 Vote count. Each contest or question on a ballot shall be counted independently as follows:

- (1) If the votes cast in a contest or question are equal to or less than the number to be elected or chosen for that contest or question, the votes shall be counted.
- (2) If the votes cast in a contest or question exceed the number to be elected or chosen for that contest or question, the votes for that contest or question shall not be counted. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(12)]

§11-152 Method of counting. (a) In an election using the paper ballot voting system, immediately after the close of the polls, the chairman of the precinct officials shall open the ballot box. The precinct officials at the precinct shall proceed to count the votes as follows:

- (1) The whole number of ballots shall first be counted to see if their number corresponds with the number of ballots cast as recorded by the precinct officials;

- (2) If the number of ballots corresponds with the number of persons recorded by the precinct officials as having voted, the precinct officials shall then proceed to count the vote cast for each candidate;
- (3) If there are more ballots or less ballots than the record calls for the precinct officials shall proceed as directed in section 11-153.

(b) In those precincts using the electronic voting system, the ballots shall be taken in the sealed ballot boxes to the counting center according to the procedure and schedule promulgated by the chief election officer to promote the security of the ballots. In the presence of official observers, counting center employees may start to count the ballots prior to the closing of the polls provided there shall be no printout by the computer or other disclosure of the polls. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(vv); am L 1975, c 36, §1(13); am L 1977, c 189, §1(10); am L 1980, c 264 §1(p)]

§11-153 More or less ballots than recorded. If there are more ballots than the poll book indicates, this shall be an overage and if less ballots, it shall be an underage. The election officials or counting center employees responsible for the tabulation of ballots shall make a note of this fact on a form to be provided by the chief election officer. The form recording the overage or underage shall be sent directly to the chief election officer or the clerk in county elections separate and apart from the other election records.

If the electronic voting system is being used in an election, the overage or underage may be recorded after the tabulation of the ballots. In an election using the

paper ballot voting system, the precinct officials shall proceed to count the vote cast for each candidate or on a question after recording the overage or underage.

As soon after the election as possible the chief election officer or the clerk shall make a list of all precincts in which an overage or underage occurred and the amount of the overage or underage. This Act shall be kept as a public record in the office of the chief election officer or the clerk in county elections and the clerk's office in counties other than the city and county of Honolulu in elections involving state candidates.

An election contest may be brought under part XI, if the overage or underage in any district could affect the outcome of an election. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(14)]

§11-154 Records, etc.; disposition. The final duty of the precinct officials in the operation of the precinct shall be to gather all records and supplies delivered to them and return them to the sending official, either the chief election officer or the county clerk.

The voted ballots shall be kept secure and handled only in the presence of representatives not of the same political party in accordance with regulations promulgated for the various voting systems. After all the ballots have been tabulated they shall be sealed in containers. Thereafter these containers shall be unsealed and resealed only as prescribed by rules and regulations governing the elections.

The ballots and other election records may be destroyed by the chief election officer or county clerk

when all elected candidates have been certified by the chief election officer, or in the case of candidates for county offices, by the county clerk. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ww)]

§11-155 Certification of results of election. On receipt of certified tabulations from the election officials concerned, the chief election officer or county clerk in county elections shall compile, certify, and release the election results after the expiration of the time for bringing an election contest. The number of persons to be elected receiving the highest number of votes in any election district shall be declared to be elected. [L 1970, c 26, pt of §2; am L 1980, c 264, §1(q)]

§11-156 Certificate of election, form. The chief election officer or county clerk shall deliver certificates of election to the persons elected as determined under section 11-155. Those certificates shall be delivered only after the filing of expense statements by the person elected in accordance with part XII and after the expiration of the time for bringing an election contest. If there is an election contest the certificate shall be delivered only after a final determination in the contest has been made and the time for an appeal has expired. The certificate shall be substantially in the following form:

CERTIFICATE OF ELECTION

I, _____, chief election officer (county clerk) of Hawaii (county), do hereby certify that _____ was on the _____ day of _____ 19____, duly elected a _____ (name of office) _____ for the _____ district

for a term expiring on the _____ day of _____, A.D. 19____

Witness my hand this _____ day of _____, A.D. 19____

Chief Election Officer
(County Clerk)

[L 1970, c 26, pt of §2]

§11-157 In case of tie. In case of the failure of an election by reason of the equality of vote between two or more candidates, the tie may be decided by lot, under the supervision of the chief election officer or county clerk in the case of county elections. When an election is decided by lot, the candidates shall agree in a signed statement to the use of a lot. If the candidates agree, they shall be bound by the lot and shall not bring an election contest under part XI after the drawing of the lot. Each candidate shall be present at the drawing of the lot together with two witnesses to be selected by the candidate. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

* * *

PART I. NOMINATION; DETERMINATION OF CANDIDATES

§12-1 Application of chapter. All candidates for elective office, except as provided in section 14-21, shall be nominated in accordance with this chapter and not otherwise. [L 1970, c 26, pt of §2]

§12-1.5 REPEALED. L 1980, c 139, §1.

§12-2 Primary held when; candidates only those nominated. The primary shall be held at the polling place for each precinct on the second to the last Saturday of September in every even numbered year; provided that in no case shall any primary election precede a general election by less than forty-five days.

No person shall be a candidate for any general or special general election unless the person has been nominated in the immediately preceding primary or special primary. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(a); am L 1975, c 36, §2(l); am L 1976, c 106, §2(l); am L 1979, c 122, §2; am imp L 1984, c 90, §1]

[§12-2.5] Nomination papers; when available. Nomination papers shall be made available from the first working day of February in every even-numbered year; provided that in the case of a special primary or special election, nomination papers shall be made available sixty days prior to the close of filing. [L 1979, c 133, §7]

§12-3 Nomination paper; format; limitations. (a) The name of no candidate shall be printed upon any official ballot to be used at any primary, special primary, or special election unless a nomination paper was filed in the candidate's behalf and in the name by which the candidate is commonly known. The nomination paper shall be in a form prescribed by the chief election officer containing substantially the following information:

- (1) A statement by the registered voters of the district from which the candidate is running signing the form that they are eligible to vote for the candidate at the next election;

- (2) A statement by the registered voters signing the form that they nominate the candidate for the office on the nomination paper;
- (3) The residence address and county in which the candidate resides;
- (4) The name of the candidate and the office for which the candidate is running, which name and office are to be placed on the nomination paper by the chief election officer or the clerk prior to releasing the form to the candidate;
- (5) Space for the names of the registered voters signing the form and their district or districts and precinct or precincts;
- (6) A certification by the candidate that the candidate will qualify under the law for the office the candidate is seeking;
- (7) A certification by a party candidate that the candidate is a member of the party;
- (8) A certification, where applicable, by the candidate that the candidate has complied with the provisions of Article II, section 7, of the Constitution of the State of Hawaii; and
- (9) The name the candidate wishes inserted on the ballot and the post office address of the candidate.

(b) No signatures shall be counted, unless they are upon the nomination paper having the format set forth above, written or printed thereon, and if there are separate sheets to be attached to the nomination paper, the sheets shall have the name of the person and the office for which the candidate is running placed thereon by the

chief election officer or the clerk. The nomination paper and separate sheets shall be provided by the chief election officer or the clerk.

(c) Nomination papers shall not be filed in behalf of any person for more than one party or for more than one office; nor shall any person file nomination papers both as a party candidate and as a nonpartisan candidate.

(d) The office for which the candidate is running and the candidate's name may not be changed from that indicated on the nomination paper and separate sheets. If the candidate wishes to run for an office different from that for which the nomination paper states, the candidate may request the appropriate nomination paper from the chief election officer or clerk and have it signed by the required number of voters [L 1970, c 26, pt of §2; am L 1973, c 217, §2(b); am L 1975, c 36, §2(2); am L 1979, c 139, §6; am L 1980, c 264, §2; am L 1983, c 34, §19]

§12-4 Nomination papers; qualifications of signers. No person shall sign the nomination papers of more than one candidate, partisan or nonpartisan, for the same office, unless there is more than one office in a class in which case no person shall sign papers for more than the actual number of offices in a class. Nomination papers shall be construed in this regard according to priority of filing, and the name of any person appearing thereon shall be counted only so long as this provision is not violated, and not thereafter.

No name on nomination papers shall be counted, unless the signer is a registered voter, eligible to vote for the candidate at the next election. To determine if the signers are eligible to vote for the candidate, the chief

election officer or clerk may use lists prepared in accordance with section 11-24. [L 1970, c 26, pt of §2, am L 1974, c 34, §2(a)]

§ 12-5 Nomination papers; number of signers. Nomination papers for candidates for members of Congress, governor, lieutenant governor, and the board of education shall be signed by not less than twenty-five registered voters of the State or of the Congressional district or school board district from which the candidates are running in the case of candidates for the United States House of Representatives or for the board of education.

Nomination papers for candidates for either branch of the legislature and for county office shall be signed by not less than fifteen registered voters of the district or county or subdivision thereof for which the person nominated is a candidate.

Nomination papers for candidates for members of the board of trustees of the office of Hawaiian affairs shall be signed by not less than twenty-five persons registered as prescribed under section 11-15(b). [L 1970, c 26, pt of §2; am L 1979, c 196, §6]

§12-6 Nomination papers; time for filing fees. (a) Nomination papers shall be filed as follows: for members of Congress, state, and county offices, and the board of trustees of the office of Hawaiian affairs, with the chief election officer, or clerk in case of county offices, not later than 4:30 p.m. on the sixtieth calendar day prior to the primary, special primary, or special election (but if such day is a Saturday, Sunday, or holiday then not later than 4:30 p.m. on the first working day immediately preceding); provided that any state candidate from the counties

of Hawaii, Maui, and Kausai may file the declaration of candidacy with the respective clerk. The clerk shall transmit to the office of the chief election officer the state candidate's declaration of candidacy without delay. However, if a special primary or special election is to be held by a county and the county charter requires that the council shall issue a proclamation calling for the election to be held within a specified period of time, and if that requirement would not allow the filing of nomination papers with the appropriate office by the sixtieth calendar day prior to the day for holding the special primary or special election, the council shall establish the deadline for the filing of nomination papers in the proclamation calling for the election.

(b) There shall be deposited with each nomination paper a filing fee on account of the expenses attending the holding of the primary, special primary, or special election which shall be paid into the treasury of the State, or county, as the case may be, as a realization.

- (1) For United States senators and United States representatives - \$75;
- (2) For governor and lieutenant governor - \$750;
- (3) For mayor - \$500; and
- (4) For all other offices - \$250.

(c) Upon the receipt by the chief election officer or the clerk of the nomination paper of a candidate, the day, hour, and minute when it was received shall be endorsed thereon.

(d) Upon the showing of a certified copy of an affidavit which has been filed with the campaign spending commission pursuant to section 11-208 by a candidate who has voluntarily agreed to abide by spending limits, the chief election officer or clerk shall discount the filing fee of the candidate by the following amounts:

- (1) For the office of governor and lieutenant governor - \$675;
- (2) For the office of mayor - \$450; and
- (3) For all other offices - \$225.

(e) The chief election officer or clerk shall waive the filing fee in the case of a person who declares, by affidavit, that the person is indigent and who has filed a petition signed by currently registered voters who constitute at least one-half of one per cent of the total voters registered at the last preceding general election in the respective district or districts which correspond to the specific office for which the indigent person is a candidate. This petition shall be submitted on the form prescribed and provided by the chief election officer together with the nomination paper required by this chapter. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(c); am L 1974, c 34, §2(b); am L 1975, c 36, §2(3); am L 1976, c 106, §2(2); am L 1977, c 189, §2(1); am L 1979, c 196, §7 and c 224, §5; am L 1983, c 34, §20]

§12-7 Filing of oath. The name of no candidate for any office shall be printed upon any official ballot, in any election, unless the candidate shall have taken and subscribed to the following written oath or affirmation, and filed the oath with the candidate's nomination papers.

The written oath or affirmation shall be in the following form:

"I, ___, do solemnly swear and declare, on oath that if elected to office I will support and defend the Constitution and laws of the United States of America, and the Constitution and laws of the State of Hawaii, and will bear true faith and allegiance to the same; that if elected I will faithfully discharge my duties as ___ (name of office) ___ to the best of my ability; that I take this obligation freely, without any mental reservation or purpose of evasion; So help me God."

Upon being satisfied as to the sincerity of any person claiming that the person is unwilling to take the above prescribed oath only because the person is unwilling to be sworn, the person may be permitted, in lieu of the oath, to make the person's solemn affirmation which shall be in the same form as the oath except that the words "sincerely and truly affirm" shall be substituted for the word "swear" and the phrases "on oath" and "So help me God" shall be omitted. Such affirmation shall be of the same force and effect as the prescribed oath.

The oath or affirmation shall be subscribed before the officer administering the same, who shall endorse thereon the fact that the oath was subscribed and sworn or the affirmation was made together with the date thereof and affix the seal of the officer's office or of the court of which the officer is a judge or clerk.

It shall be the duty of every notary public or other public officer by law authorized to administer oaths to administer the oath or affirmation prescribed by this section and to furnish the required endorsement and

authentication. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

§12-8 Nomination papers: challenges; evidentiary hearings and decisions. (a) All nomination papers filed in conformity with section 12-3 shall be deemed valid unless objection is made thereto by the chief election officer or the clerk in the case of county offices or by a registered voter in writing. Such objection is to be made not later than 4:30 p.m. on the second day after the close of filing except that if such day falls on a Saturday, Sunday, or holiday then the next succeeding working day. In case objection is made, notice thereof shall be given including the placement of the notice in the mail by registered or certified mail to the candidate objected thereto.

(b) The chief election officer or the clerk in the case of county offices shall have the necessary powers and authority to conduct evidentiary hearings and may administer oaths. The hearings shall be held not later than four working days after the objection is made. Nothing in this subsection shall be construed to extend to the candidate a right to an administrative contested case hearing as defined in section 91-1(5).

(c) All objections shall be decided by the chief election officer or clerk in the case of county offices not later than 4:30 p.m. on the second day after they are made or the second day after the hearing is held. All objections which are upheld shall be placed in writing by the deciding official if so requested by the candidate affected. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(d); am L 1975, c 36, §2(4); am L 1977, c 189, §2(2)]

§12-9 List of candidates. As soon as possible but not later than 4:30 p.m. on the fifth day after the close of filing the chief election officer shall transmit to each county clerk and the county clerk shall transmit to the chief election officer certified lists containing the names of all persons, the office for which each is a candidate, and their party designation, or designation of nonpartisanship, as the case may be, for whom nomination papers have been duly filed in his office and who are entitled to be voted for at the primary, special primary or special election. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(e)]

* * *

PART II. BALLOTS

§12-21 Official party ballots. There shall be only one primary or special primary ballot for each party qualifying under the provisions of sections 11-61 or 11-62.

The primary or special primary ballot shall be clearly designated as such, and shall also be designated according to party. The names of candidates shall be arranged as provided for in section 11-115; provided that in elections using the electronic voting system, the names of all candidates seeking the same office shall be printed on the same side of the ballot card; provided further that if the names of all candidates seeking the same office exceed the maximum number of voting positions on a single side of a ballot card, such names shall then be arranged and listed on both sides of the ballot card or on separate ballot cards.

The chief election officer or the county clerk, in the case of county elections, shall approve printed samples or proofs of the respective party ballots as to uniformity of size, weight, shape, and thickness prior to final printing of the official ballots. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(f); am L 1979, c 139, §7; am L 1981, c 214, §1]

§12-22 Official nonpartisan ballots. There shall be only one primary or special primary ballot containing the names of all nonpartisan candidates to be voted for and the offices for which they are candidates. The ballot shall be clearly designated as the nonpartisan primary or special primary ballot and shall conform in all other respects to the requirements relative to official party ballots. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(g); am L 1979, c 139, §8]

§12-23 REPEALED. L 1979, c 125, §4.

* * *

PART III. BALLOT SELECTION

§ 12-31 Selection of party ballot; voting. No person eligible to vote in any primary or special primary election shall be required to state a party preference or nonpartisanship as a condition of voting. Each voter shall be issued the primary or special primary ballot for each party and the nonpartisan primary or special primary ballot. A voter shall be entitled to vote only for candidates of one party or only for nonpartisan candidates. If the primary or special primary ballot is marked contrary to this paragraph, the ballot shall not be counted.

In any primary or special primary election in the year 1979 and thereafter, a voter shall be entitled to select and to vote the ballot of any one party or nonpartisan, regardless of which ballot the voter voted in any preceding primary or special primary election. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(i); am L 1974, c 34, §2(c); am L 1979, c 139, §9; am imp L 1984, c 90, §1]

* * *

PART IV. ELECTION RESULTS

§ 12-41 Result of election. (a) The person or persons receiving the greatest number of votes at the primary or special primary as a candidate of a party for an office shall be the candidate of the party at the following general or special general election but not more candidates for a party than there are offices to be elected; provided that any candidate for any county office who is the sole candidate for that office at the primary or special primary election, or who would not be opposed in the general or special general election by any candidate running on any other ticket, nonpartisan or otherwise, and who is nominated at the primary or special primary election shall, after the primary or special primary election, be declared to be duly and legally elected to the office for which the person was a candidate regardless of the number of votes received by that candidate.

(b) Any nonpartisan candidate receiving at least ten per cent of the total votes cast for the office for which the person is a candidate at the primary or special primary, or a vote equal to the lowest vote received by the partisan candidate who was nominated at the primary or special

primary, shall also be a candidate at the following election; provided that when more nonpartisan candidates qualify for nomination than there are offices to be voted for at the general or special general election, there shall be certified as candidates for the following election those receiving the highest number of votes, but not more candidates than are to be elected. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(i); am L 1979, c 139, §10; am L 1983, c 34, §21]

§12-42 Unopposed candidates declared elected. (a) Any candidate running for any office in the State of Hawaii in a special election or special primary election who is the sole candidate for that office shall, after the close of filing of nomination papers, be deemed and declared to be duly and legally elected to the office for which the person is a candidate. The term of office for a candidate elected under this subsection shall begin respectively on the day of the special election or on the day of the immediately succeeding special general election.

(b) Any candidate running for any office in the State of Hawaii in a special general election who was only opposed by a candidate or candidates running on the same ticket in the special primary election and is not opposed by any candidate running on any other ticket, nonpartisan or otherwise, and is nominated at the special primary election shall, after the special primary, be deemed and declared to be duly and legally elected to the office for which the person is a candidate at the special primary election regardless of the number of votes received. The term of office for a candidate elected under this subsection shall begin on the day of the special general election. [L 1974, c 34, §2(d); am L 1985, c 203, §6]

* * *

PART I. GENERAL PROVISIONS

§16-1 Voting systems authorized. The chief election officer may adopt, experiment with, or abandon any voting system authorized under this chapter or to be authorized by the legislature. These systems shall include, but not be limited to voting machines, paper ballots, and electronic voting systems. All voting systems approved by the chief election officer under this chapter are authorized for use in all elections for voting, registering, and counting votes cast at the elections.

Voting systems of different kinds may, at the discretion of the chief election officer, be adopted for different precincts within the same district. The chief election officer may provide for the experimental use at any election, in one or more precincts, of a voting system without a formal adoption thereof and its use at the election shall be as valid for all purposes as if it had been permanently adopted; provided that if a voting machine is used experimentally under the paragraph it need not meet the requirements of section 16-12. [L 1970, c 26, pt of §2]

§16-2 Voting system requirements. All voting systems adopted under this chapter by the chief election officer for the legislature shall satisfy the following requirements:

- (1) It shall secure to the voter secrecy in the act of voting;
- (2) It shall provide for voting for all candidates of as many political parties as may make nominations, nonpartisans, and for or against as many questions as are submitted;

- (3) It shall correctly register or record and accurately count all votes cast for any and all persons, and for or against any and all questions. [L 1970, c 26, pt of §2]

* * *

PART II. VOTING MACHINE SYSTEM

§ 16-11 Definitions. "Protective counter" means an apparatus built into the voting machine which cannot be reset, which records the total movement of the operating lever.

"Voting machine system" means the method of electrically, mechanically, or electronically recording and counting votes upon being cast. [L 1970, c 26, pt of §2; am L 1975, c 36, §5(2)]

§ 16-12 Voting machines; requirements. No voting machine shall be installed for use in any election in the State unless it shall satisfy the following requirements:

- (1) It shall permit the voter to vote for as many persons for an office as the voter is lawfully entitled to vote for, but no more;
- (2) It shall prevent the voter from voting for the same persons more than once for the same office;
- (3) It shall permit the voter to vote for or against any question the voter may have the right to vote on, but no other;
- (4) In special primary and primary elections it shall be so equipped that it will lock out all rows except those of the party or nonpartisan candidates selected by the voter;

- (5) It shall be provided with a protective counter or protective device whereby any operation of the machine before or after the election will be detected;
- (6) It shall be provided with a counter which shall show at all times during an election how many persons have voted;
- (7) It shall be provided with a mechanical model, illustrating the manner of voting on the machine, suitable for the instruction of voters. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(a); am L 1980, c 264, §5(a); am imp L 1984, c 90, §1]

* * *

PART III. PAPER BALLOT VOTING SYSTEM

§16-21 Definition. "Paper ballot voting system" means the method of recording votes which are counted manually. [L 1970, c 26, pt of §2; am L 1975, c 36, §5(4)]

§16-22 Marking. The method of marking a paper ballot shall be prescribed by the chief election officer by rules and regulations promulgated in accordance with chapter 91. The chief election officer shall prescribe a uniform method of marking the ballots in all precincts in a county and for absentee voting by paper ballot. [L 1970, c 26, pt of §2; am L 1984, c 90, §1]

§16-23 Paper ballot; voting. Upon receiving the ballot the voter shall proceed into one of the voting booths provided for the purpose, and shall mark the voter's ballot in the manner prescribed by section 16-22.

The voter shall then leave the booth and deliver the ballot to the precinct official in charge of the ballot boxes.

The precinct official shall be sufficiently satisfied that there is but one ballot enclosed, whereupon the ballot shall be immediately dropped into the proper box by the precinct official. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(b); am L 1977, c 189, §4; am imp L 1984, c 90, §1]

§16-24 Count, public. Insofar as the limits of the room in which the voting takes place reasonably allow, no person shall be prevented from attending the counting of the ballots on election day, unless it is necessary to preserve the peace. [L 1970, c 26, pt of §2]

§16-25 Order and method of counting. Each ballot shall be counted and finished as to all the candidates thereon before counting a second and subsequent ballots. Except as provided in section 11-71, the ballots shall be counted by teams in the following manner only: by one precinct official announcing the vote in a loud clear voice, one precinct official tallying the vote, one precinct official watching the precinct official announcing the vote and one precinct official watching the precinct official tallying the vote. The precinct official doing the announcing or tallying and the precinct official watching him shall not be of the same political party. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(c)]

§16-26 Questionable ballots. A ballot shall be questionable if:

- (1) A ballot contains any mark or symbol whereby it can be identified, or any mark or symbol contrary to the provisions of law; or
- (2) Two or more ballots are found in the ballot box so folded together as to make it clearly

evident that more than one ballot was put in by one person, the ballots shall be set aside as provided below.

Each ballot which is held to be questionable shall be endorsed on the back by the chairman of precinct officials with the chairman's name or initials, and the word "questionable". All questionable ballots shall be set aside uncounted and disposed of as provided for ballots in sections 11-54. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 6(d); am imp L 1984, c 90, § 1]

§ 16-27 Number of blank and questionable ballots; record of. In addition to the count of the valid ballots, the precinct officials shall, as to each separate official ballot, also determine and record the number of totally blank ballots and the number of questionable ballots. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 6(e)]

§ 16-28 Declaration of results. When the precinct officials have ascertained the number of votes given for each candidate they shall make public declaration of the whole number of votes cast, the names of the persons voted for, and the number of votes for each person. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 6(f)]

§ 16-29 Tally sheets. The tally sheets in counting the ballots cast shall be marked and handled in a secure fashion prescribed in rules and regulations promulgated by the chief election officer in accordance with chapter 91. [L 1970, c 26, pt of § 2]

* * *

PART IV. ELECTRONIC VOTING SYSTEM

§ 16-41 Definitions. "Counting center" means the computer facilities and surrounding premises designated by the chief election officer or the clerk in county elections where electronic voting system ballots are counted.

"Defective ballot" means any ballot delivered to the counting center in accordance with section 11-152 that cannot be read by the ballot reading device.

"Electronic voting system" means the method of recording votes which are counted by automatic tabulating equipment. [L 1970, c 26, pt of § 2; am L 1975, c 36, § 5(6)]

§ 16-42 Electronic voting requirements. When used at primary or special primary elections, the automatic tabulating equipment of the electronic voting system shall count only votes for the candidates of one party, or nonpartisans. In all elections the equipment shall reject all votes for an office when the number of votes therefore exceeds the number which the voter is entitled to cast. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 6(g); am L 1979, c 139, § 12]

§ 16-43 Ballot handling. In every case where the ballots are handled by election officials or election employees, from the time the ballots are delivered to the several precincts to the time they are returned to the chief election officer or clerk in county elections for disposition upon completion of the tabulation, they shall be handled in the presence of not less than two officials assigned in accordance with sections 11-71 and 11-72 or section 16-45. [L 1970, c 26, pt of § 2; am L 1975, c 36, § 5(7)]

§ 16-44 Counting center employees. (a) The chief election officer or clerk in county elections shall designate counting center employees who will be responsible for the tabulation of the ballots.

(b) Counting center employees shall follow the procedures established by the chief election officer for the tabulation of the ballots. [L 1970, c 26, pt of § 2; am L 1975, c 36, § 5(8)]

§ 16-45 Official observers. Official observers shall be designated by the chief election officer or the clerk in county elections to be present at the counting centers and selected in the following manner:

- (1) No less than one official observer designated by each political party;
- (2) No less than one official observer from the news media;
- (3) Additional official observers as space and facilities permit designated by the chief election officer in state elections and the clerk in county elections.

The chief election officer or clerk shall give all official observers reasonable notice of the time and place where the ballots shall be counted. No person shall be permitted in the counting center without the written authorization of the chief election officer or clerk. [L 1975, c 36, § 5(9)]

§ 16-46 Counting defective ballots. Counting center employees in the presence of at least two official observers shall prepare a new ballot to replace each defective ballot. The defective ballots shall be segregated and the replacement ballots counted pursuant to rules

promulgated by the chief election officer. [L 1975, c 36, § 5(9)]

[§ 16-47] Preparation of absentee ballots. Counting center employees in the presence of at least two official observers shall prepare absentee ballots for counting by automatic tabulating equipment in a manner that shall accurately reflect the votes cast by the absentee voters. [L 1980, c 264, § 5(b)]

* * *

§ 17-1 United States senator. When a vacancy occurs in the office of United States senator the vacancy shall be filled for the unexpired term at the following state general election, provided that the vacancy occurs not later than 4:30 p.m. on the sixtieth day prior to the primary for nominating candidates to be voted for at the election; otherwise at the state general election next following. The chief election officer shall issue a proclamation designating the election for filling vacancy. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election and qualification of the person duly elected to fill the vacancy and shall be a registered member of the same political party as the senator causing the vacancy. All candidates for the unexpired term shall be nominated and elected in accordance with this title. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 7(a)]

§ 17-2 United States representative. When a vacancy occurs in the representation of this State in the United States House of Representatives, the chief election officer shall issue a proclamation for an election to fill the

vacancy unless the unexpired term is for less than one hundred eighty days. If the unexpired term is less than one hundred eighty days; the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be of the same political party as the person the appointee succeeds. The proclamation shall be issued not later than on the sixtieth day prior to the election to fill the vacancy and shall contain the date, time, and places where the special election is to be held, the time within which nomination papers shall be filed, the time for transmitting to county clerks the notice designating the offices for which candidates are to be elected, the time for transmitting to county clerks lists of candidates to be voted for at the special election and such other matters as provided for in section 11-19 and which are not inconsistent with this section. The special election shall be conducted and the results ascertained so far as practicable, in accordance with this title. Pending the election, the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election and qualification of the person duly elected to fill the vacancy and shall be registered member of the same political party as the representative causing the vacancy. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 7(b); am L 1974, c 34, § 4(a); am imp L 1984, c 90, § 1]

§ 17-3 State senator. Whenever any vacancy in the membership of the state senate occurs, the term of which ends at the next succeeding general election, the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be the same

political party or nonpartisanship as the person the appointee succeeds.

In the case of a vacancy, the term of which does not end at the next succeeding general election:

- (1) If it occurs not later than on the tenth day prior to the close of filing for the next succeeding primary election, the vacancy shall be filled for the unexpired term at the next succeeding general election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. All candidates for the unexpired term shall be nominated and elected in accordance with this title. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election of the person duly elected to fill the vacancy. The appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds.
- (2) If it occurs later than on the tenth day prior to the close of filing for the next succeeding primary election but not later than on the thirtieth day prior to the next succeeding primary election, or if there are so qualified candidates for any party or nonpartisan candidates qualified for the primary election ballot, nominations for the unexpired term may be filed not later than 4:30 p.m. on the thirtieth day prior to the next succeeding primary election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. Pending the election the governor shall

make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election of the person duly elected to fill the vacancy. The appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds.

- (3) If it occurs after the thirtieth day prior to the next succeeding primary but not later than on the thirtieth day prior to the next succeeding general election, or if there are no qualified candidates for any party or nonpartisan candidates in the primary, the vacancy shall be filled for the unexpired term at the next succeeding general election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. Party candidates for the unexpired senate term shall be nominated by the county committees of the parties not later than 4:30 p.m. on the thirtieth day prior to the general election; nonpartisan candidates may file nomination papers for the unexpired term not later than 4:30 p.m. on the thirtieth day prior to the general election with the nonpartisan candidate who is to be nominated to be decided by lot, under the supervision of the chief election officer. The candidates for the unexpired term shall be elected in accordance with this title. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election of the person duly elected to fill such vacancy. The appointee shall be of the same political

party or nonpartisanship as the person the appointee succeeds.

- (4) If it occurs after the thirtieth day prior to the next succeeding general election or if no candidates are nominated, the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 7(c); am L 1980, c 247, § 2; am imp L 1984, c 90, § 1]

§ 17-4 State representatives. Whenever any vacancy in the membership of the state house of representatives occurs, the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be of the same political party as the person the appointee succeeds. [L 1970, c 26, pt of § 2; am imp L 1984, c 90, § 1]

§ 17-5 Failure to elect. Whenever any vacancy occurs in the offices provided in this chapter because of failure to elect a person at an uncontested general election, the chief election officer shall issue a proclamation for a special primary and general election. The special primary election shall be held not sooner than on the seventy-fifth day and not later than on the one hundred twentieth day after the issuance of the proclamation and the special general election shall be held not sooner than on the twentieth day and not later than on the thirtieth day after the special primary election. Nomination papers shall be filed in accordance with section 12-6. [L 1971, c 174 § 1; am L 1973, c 217, § 7(d)]

§ 17-6 Board of education members. (a) The governor shall make an appointment to fill any vacancy in the membership of the board of education for the unexpired term of that vacancy whenever a vacancy occurs and the term of that vacancy ends at the time of the next succeeding general election.

(b) In the case of a vacancy, the term of which does not end at the time of the next succeeding general election:

- (1) If it occurs not later than on the thirtieth day prior to the next succeeding general election, the vacancy shall be filled for the unexpired term at the next succeeding general election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. All candidates for the unexpired term shall file nomination papers not later than 4:30 p.m. on the thirtieth day prior to the general election (but if such day is a Saturday, Sunday, or holiday then not later than 4:30 p.m. on the first working day immediately preceding) and shall be elected in accordance with this title. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election of the person duly elected to fill such vacancy.
- (2) If it occurs after the thirtieth day prior to the next succeeding general election, the governor shall make an appointment to fill the vacancy for the unexpired term.

(c) All appointments made by the governor under this section shall be made without consideration of the

appointee's party affiliation or preference or nonpartisanship, however the persons so appointed shall meet the residency requirement specified in section 13-1. [L 1979, c 125, § 2; am L 1980, c 247, § 3; am L 1981, c 100, § 3; am L 1985, c 170, § 1]

§ 17-7 Board of trustees, office of Hawaiian affairs.

(a) Whenever any vacancy in the membership of the board of trustees occurs, the term of which ends at the next succeeding special election held in conjunction with the general election, the vacancy shall be filled by a two-thirds vote of the remaining members of the board. If the board fails to fill the vacancy within sixty days after it occurs, the governor shall fill the vacancy within ninety days after the vacancy occurs. When island residency is required under section 13D-1, the person so appointed shall reside on the island from which the vacancy occurred, and shall serve for the duration of the unexpired term.

(b) In the case of a vacancy, the term of which does not end at the next succeeding special election held in conjunction with the general election:

- (1) If it occurs not later than on the thirtieth day prior to the next succeeding special election held in conjunction with the general election, the vacancy shall be filled for the unexpired term at the next succeeding special election held in conjunction with the general election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. All candidates for the unexpired term shall file nomination papers not later than 4:30 p.m. on the thirtieth day prior to the special

election (but if such day is Saturday, Sunday, or holiday then not later than 4:30 p.m. on the first working day immediately preceding) and shall be elected in accordance with this title. Pending the election, the board or the governor shall make a temporary appointment to fill the vacancy in the manner prescribed under subsection (a). When island residency is required under section 13D-1, the person so appointed shall reside on the island from which the vacancy occurred, and shall serve for the duration of the unexpired term and shall serve until the election of the person duly elected to fill such vacancy.

- (2) If it occurs after the thirtieth day prior to the next succeeding special election held in conjunction with the general election, the board or the governor shall make an appointment to fill the vacancy in the manner prescribed under subsection (a). When island residency is required under section 13D-1, the person so appointed shall reside on the island from which the vacancy occurred, and shall serve for the duration of the unexpired term.

(c) All appointments made by the board or the governor under this section shall be made without consideration of the appointee's party preference or nonpartisanship. [L 1979, c 196, § 9; am L 1980, c 247, § 4]

AMENDMENTS TO HAWAII REVISED STATUTES

PART V. PARTIES

§ 11-61 "Political party" defined. (a) The term "political party" means any party which has qualified as a political party under sections 11-62 and 11-64 and has not been disqualified by this section. A political party shall be an association of voters united for the purpose of promoting a common political end or carrying out a particular line of political policy and which maintains a general organization throughout the State, including a regularly constituted central committee and county committees in each county other than Kalawao.

(b) Any party which does not meet the following requirements or the requirements set forth in sections 11-62 to 11-63, shall be subject to disqualification:

- (1) A party must have had candidates running for election at the last general election for any of the offices listed in paragraphs (2) to (5) whose terms had expired. This does not include those offices which were vacant because the incumbent had died or resigned before the end of the incumbent's term;
- (2) The party received at least ten per cent of all votes cast for any of the offices voted upon by all the voters in the State;
- (3) The party received at least ten per cent of all the votes cast in at least fifty per cent of the congressional districts;

- (4) The party received at least ten per cent of all the votes cast in at least the six senatorial districts with the lowest votes cast for the office of state senator; or
- (5) The party received at least ten per cent of all the votes cast in at least fifty per cent of the representative districts for the office of state representative. [L 1970, c 26, pt of § 2; am L 1979, c 125, § 3(1); am L 1983, c 34, § 3; am L 1986, c 323, § 1]

§ 11-62 Qualification of political parties; petition.

(a) Any group of persons hereafter desiring to qualify as a political party for election ballot purposes in the State shall file with the chief election officer a petition as hereinafter provided. The petition for qualification as a political party shall:

- (1) Be filed not later than 4:30 p.m. on the one hundred fiftieth day prior to the next primary;
- (2) Declare as concisely as may be the intention of signers thereof to qualify as a statewide political party in the State and state the name of the new party;
- (3) Contain the signatures of currently registered voters comprising not less than one per cent of the total registered voters of the State as of the last preceding general election;
- (4) Be accompanied by the names and addresses of the officers of the central committee and of the respective county committees of the political party and by the party rules; and

- (5) Be upon the form prescribed and provided by the chief election officer.

(b) The petition shall be subject to hearing under chapter 91, if any objections are raised by the chief election officer or any other political party. All objections shall be made not later than 4:30 p.m. on the tenth day after the petition has been filed. If no objections are raised by 4:30 p.m. on the tenth day, the petition shall be approved. If an objection is raised, a decision shall be rendered not later than 4:30 p.m. on the thirtieth day after filing of the petition or not later than 4:30 p.m. on the one hundredth day prior to the primary, whichever shall first occur.

(c) The chief election officer may check the names of any persons on the petition to see that they are registered voters and may check the validity of their signatures. The petition shall be public information upon filing.

(d) Each group of persons desiring to qualify as a political party shall qualify under this section for three general elections, after which the group shall be deemed a political party for the following ten-year period, provided that each party qualified under this section shall continue to field candidates for public office during the ten year period following qualification. After each ten-year period, the party qualified under this section shall either remain qualified under the standards set forth in section 11-61, or requalify under this section 11-62. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 1(p); am L 1983, c 34, § 4; am L 1986, c 323, § 2]

§ 11-63 Party rules, amendments to be filed. All parties must file their rules with the chief election officer

not later than 4:30 p.m. on the one hundred fiftieth day prior to the next primary. All amendments shall be filed with the chief election officer not later than 4:30 p.m. on the thirtieth day after their adoption. The rules and amendments shall be duly certified to by an authorized officer of the party and upon filing, the rules and amendments thereto shall be a public record. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 1(q); am L 1983, c 34, § 5; am L 1986, c 323, § 3]

* * *

§ 11-118 Vacancies; new candidates; insertion of names on ballots. In case of death, withdrawal, or disqualification of any party candidate after filing, the vacancy so caused may be filled by the appropriate committee of the party. The party shall be notified by the chief election officer or the clerk in the case of a county office immediately after the death, withdrawal, or disqualification. If the party fills the vacancy, and so notifies the chief election officer or clerk not later than 4:30 p.m. on the third day after the vacancy occurs, but not later than 4:30 p.m. on the fiftieth day prior to a primary or special primary election or not later than 4:30 p.m. on the fortieth day prior to a special, general, or special general election, the name of the replacement shall be printed in an available and appropriate place on the ballot, not necessarily in alphabetical order. The chief election officer or county clerk in county elections may waive any or all of the foregoing requirements in special circumstances as provided in the rules adopted by the chief election officer. If no substitution is made, the candidacy involved shall be declared vacant. [L 1970, c 26, pt of § 2; am L 1973, c

217, § 1(jj); am L 1980, c 247, § 1; am L 1983, c 34, § 16; am L 1986, c 305, § 1]

* * *

PART II. BALLOTS

§ 12-21 Official party ballots. The primary or special primary ballot shall be clearly designated as such. The names of the candidates of each party qualifying under section 11-61 or 11-62 and of nonpartisan candidates may be printed on separate ballots, or on a single ballot. The name of each party and the nonpartisan designation shall be distinctly printed and sufficiently separate from each other. The names of all candidates shall be printed on the ballot as provided in section 11-115. When the names of all candidates of the same party for the same office exceed the maximum number of voting positions on a single side of a ballot card, the excess names may be arranged and listed on both sides of the ballot card and additional ballot cards if necessary. When separate ballots for each party are not used, the order in which parties appear on the ballot, including nonpartisan, shall be determined by lot.

The chief election officer or the county clerk, in the case of county elections, shall approve printed samples or proofs of the respective party ballots as to uniformity of size, weight, shape, and thickness prior to final printing of the official ballots. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 2(f); am L 1979, c 139, § 7; am L 1981, c 214, § 1; am L 1987, c 232, § 2]

* * *

[§ 15-3.5] Federal write-in absentee ballot. Notwithstanding the provisions of this chapter and chapters 11 and 16, the federal write-in absentee ballot for overseas voters in general elections for federal office which must be prescribed under section 1973ff of title 42, United States Code, as amended, may be used in general elections for federal offices. [L 1987, c 211, § 1]

§ 15-4 Request for absentee ballot. Any person registered to vote may request an absentee ballot in person or in writing from the clerk not earlier than on the sixtieth day and not later than 4:30 p.m. on the seventh day prior to the election. Any mailed requests for an absentee ballot shall be mailed by the person directly to the clerk. The clerk may waive any or all of the foregoing requirements in special cases as provided in the rules adopted by the chief election officer.

The request shall include information such as the person's social security number, date of birth, and the address under which the person is registered to vote. The request shall also include the address to which the person wishes the requested ballot forwarded. The request, when made for any primary or special primary election, may include an additional request for an absentee ballot to be voted at any election immediately following the primary or special primary provided the person so indicates in the person's request.

Subsequent to the closing of registration for each election, the clerk may mail a request form for an absentee ballot to each voter in a remote area who has not

already made such a request. The request form shall be accompanied by:

- (1) A stamped, self-addressed envelope; and
- (2) Instructions regarding the manner of completing and returning the request form. [L 1975, c 36, pt of § 3; am L 1980, c 248, § 1(b); am L 1981, c 29, § 1(2); am imp L 1984, c 90, § 1; am L 1986, c 305, § 5]

* * *

§ 17-2 United States representative. When a vacancy occurs in the representation of this State in the United States House of Representatives, the chief election officer shall issue a proclamation for an election to fill the vacancy. The proclamation shall be issued not later than on the sixtieth day prior to the election to fill the vacancy and shall contain the date, time, and places where the special election is to be held, the time within which nomination papers shall be filed, the time for transmitting to county clerks the notice designating the offices for which candidates are to be elected, the time for transmitting to county clerks lists of candidates to be voted for at the special election and such other matter as provided for in section 11-91 and which are not inconsistent with this section. The special election shall be conducted and the results ascertained so far as practicable, in accordance with this title. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 7(b); am L 1974, c 34, § 4(a); am imp L 1984, c 90; § 1; am L 1986, c 305, § 6]

Hawaii House Standing Committee Rep. No. 762-86, reprinted from 1986 Haw. H.J. 1370. -

SCRep. 762-86 Judiciary on 3.B. No. 303

The purpose of this bill is to amend the requirements by which a political party qualifies and remains qualified to appear on the ballot in State elections.

The bill provides that a party may qualify by petition as well as by election result. The bill further provides that if a party qualifies through petition for three consecutive general elections, it will be deemed a political party for the following ten year period.

Your Committee heard testimony in support of the bill from the Lieutenant Governor and the Libertarian Party of Hawaii. The Libertarian Party testified that it is sometimes difficult to field a sufficient number of candidates to remain qualified as a party and further that the percentage of votes required to remain qualified is among the highest in the nation.

Your Committee finds that qualifying by petition is an acceptable alternative to qualifying by election results which is a continuous process.

Your Committee amended the bill to delete the provision that parties previously qualified under section 11-61, HRS, requalify after the bill is passed. Your Committee believes that parties presently qualified should not have to immediately requalify.

Your Committee further amended the bill to require that a party who qualifies by petition continue to field candidates for political office during the ten year period following qualification. Your Committee believes that the party must continue to field candidates in order to remain a viable party.

Your Committee also made certain technical, non-substantive amendments for style and clarity.

Your Committee on Judiciary is in accord with the intent and purpose of S.B. No. 303, S.D. 1, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 303, S.D. 1, H.D. 1, and be placed on the calendar for Third Reading.

Signed by all members of the Committee.

* * *

Hawaii Constitution, Article III, § 4 (1988)

ELECTION OF MEMBERS; TERM

Section 4. Each member of the legislature shall be elected at an election. If more than one candidate has been nominated for election to a seat in the legislature, the member occupying that seat shall be elected at a general election. If a candidate nominated for a seat at a primary election is unopposed for that seat at the general election the candidate shall be deemed elected at the primary election. The term of office of a member of the house of representatives shall be two years and the term of office of a member of the senate shall be four years. The term of a member of the legislature shall begin on the day of the general election at which elected or if elected at a primary election on the day of the general election immediately following the primary election at which elected. For a member of the house of representatives, the term shall end on the day of the general election immediately following the day the member's term commences. For a member of the senate, the term shall end on the day

of the second general election immediately following the day the member's term commences. [Ren Const Con 1978 and election Nov 7, 1978; am HB 572 (1987) and election Nov 8, 1988]

APPENDIX "C"

Article I, § 4, clause 1 of the Constitution provides

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]

The Tenth Amendment to the Constitution provides

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article I, § 4 of the Hawaii Constitution of 1978 provides

No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to the petition the government for a dress of grievances.

Article I, § 5 of the Hawaii Constitution of 1978 provides

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.
